

No. 533 15

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

A. GUTHRIE & CO., INC.,

Appellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Appellee,

AND

CHESLEY TUG & BARGE COMPANY, a
corporation,

Appellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Appellee.

Apostles on Appeals

*Appeals from the United States District Court
for the Western District of Washington,
Southern Division*

VOLUME I

Pages 1 to 417

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CLERK

No.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

A. GUTHRIE & CO., INC.,
vs. *Appellant,*

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,
Appellee,

AND

CHESLEY TUG & BARGE COMPANY, a
corporation,
Appellant,
vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,
Appellee.

Apostles on Appeals

*Appeals from the United States District Court
for the Western District of Washington,
Southern Division*

VOLUME I
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NAMES AND ADDRESSES OF COUNSEL IN
CONSOLIDATED CAUSES ON APPEAL.

WILLIAM H. GORHAM, Esquire, Proctor for
Appellants,

659 Colman Building, Seattle, Washington.

Messrs. COSGROVE & TERHUNE, Proctors for
Appellees,

2002 L. C. Smith Building, Seattle, Wash-
ington.

2 *A. Guthrie & Company, Inc., et al., vs.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.
IN ADMIRALTY.

No. 5538.

A. GUTHRIE & CO., INC.,
Libellant,
vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,
Respondent.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a
corporation,
Libellant,
vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,
Respondent.

STATEMENT.

CAUSE NO. 5538.

TIME OF COMMENCEMENT OF CAUSE.

July 31, 1926.

NAMES OF PARTIES TO CAUSE.

A. GUTHRIE & CO., INC., Libellant.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation, Respondent.

NAMES AND ADDRESSES OF COUNSEL.

William H. Gorham, 659 Colman Building, Seattle, Washington, for Libellant and Appellant.

Howard Cosgrove and Robert S. Terhune, 2002 L. C. Smith Building, Seattle, Washington, for Respondent.

DATE OF FILING OF PLEADING.

Libel filed July 31, 1926.

Amended libel filed February 4, 1927.

Answer filed September 14, 1927.

Stipulation (1) consolidating cause with cause No. 5539 for purposes of trial; (2) Interrogations and answers to be considered as in both causes; (3) Amending answer; dated September 19, 1927, and filed September 28, 1927.

Process, simple monition; no attachment, no arrest, no bail.

Time of trial, December 27th to 31st, inclusive, 1927.

Name of Judge presiding at trial, was the Honorable Edward E. Cushman, of said District Court.

The trial of said cause on the merits, consolidated by stipulation of parties and by order of said District Court with cause No. 5539 for the purposes of trial, was held in open court.

Date of entry of final decree in said cause was February 29, 1928.

Date when the Notice of Appeal in said cause was served and filed was May 24th and 25th, respectively, 1928.

The amount of supersedeas bond was fixed by order of said District Court on May 25th, 1928.

The supersedeas and bond on appeal of Libellant approved by Respondent and thereafter approved by the Judge of said District Court, was filed May 25, 1928.

Assignment of Errors filed May 25, 1928.

Stipulation and Order of District Court enlarging time for settling, etc., Statement of Facts and within which to file Apostles on Appeals and docket said causes in Appellate Court, filed May 25, 1928.

CAUSE NO. 5539.

TIME OF COMMENCEMENT OF CAUSE.

July 31, 1926.

NAMES OF PARTIES TO CAUSE.

Chesley Tug & Barge Company, a corporation,
Libellant.

Standard Marine Insurance Company, Ltd., a
corporation, Respondent.

NAMES AND ADDRESSES OF COUNSEL.

William H. Gorham, 659 Colman Building,
Seattle, Washington, for Libellant and Appellant.

Howard Cosgrove and Robert S. Terhune, 2002
L. C. Smith Building, Seattle, Washington, for
spondent and Appellant.

DATE OF FILING OF PLEADINGS.

Libel filed July 31, 1926.

Second amended libel filed November 1, 1926.

Exceptions to amended libel filed October 9, 1926.

Stipulation that exceptions to amended libel should stand as exceptions to second amended libel, filed November 1, 1926.

Stipulation as to marine insurance contract pleaded in second amended libel and that no reformation required or necessary, filed November 27, 1926.

Memo. decision overruling exceptions to second amended libel, filed January 21, 1927.

Order overruling exceptions to second amended libel filed February 14, 1927.

Answer to second amended libel filed February 15, 1927.

Answer of Libellant to interrogations propounded by Respondent filed December 14, 1927.

Further answer of Libellant to interrogations propounded by Respondent, filed December 22, 1927.

Process, simple maritime; no attachment, no arrest, no bail.

Time of trial, December 27th to 31st, inclusive, 1927.

Name of Judge presiding at trial was the Honorable Edward E. Cushman of said District Court.

The trial of said cause on the merits, consolidated by stipulation of parties and by order of District Court with cause No. 5538 for the purposes of trial, was held in open court.

Date of entry of final decree in said cause was February 29, 1928.

Date when the Notice of Appeal in said cause was served and filed was May 24th and 25th, respectively, 1928.

The amount of the supersedeas bond was fixed by order of said District Court on May 25th, 1928.

The supersedeas and bond on appeal by Libellant approved by Respondent and thereafter approved by the Judge of said District Court, was filed May 25, 1928.

Assignment of Errors filed May 25, 1928.

Stipulation and Order of District Court enlarging time for settling, etc., Statement of Facts and within which to file Apostles on Appeals and docket said causes in Appellate Court, filed May 25, 1928.

STATEMENT COMMON TO BOTH CAUSES.

All of the testimony and other proofs adduced at the trial of said consolidated causes, including depositions read into the record at the trial.

Memorandum of Decision of the Trial Court filed February 10, 1928.

Order enlarging time for settling, etc., Statement of Facts and within which to file Apostles on

Appeals and docket said causes in Appellate Court, filed July 13, 1928.

Order sending up original exhibits, filed September 26, 1928.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5538.

A. GUTHRIE & CO., INC.,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

AMENDED LIBEL.

To the Honorable E. E. Cushman, Judge of the
above entitled Court:

The amended libel of A. Guthrie & Co., Inc., a corporation of the State of Minnesota, against the Standard Marine Insurance Company, Ltd., a corporation of Liverpool, England, in a cause of contract, civil and maritime, alleges as follows:

I.

That the Libellant during all the times herein mentioned was and now is a corporation organized

(Amended Libel—Cause No. 5538)

and existing under and by virtue of the laws of the State of Minnesota and doing business in the State of Oregon.

II.

That the Respondent at all the times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of Great Britain, writing marine insurance and licensed and authorized by the State of Washington to do and doing a marine insurance business in said state, and has complied with the statutes of the State of Washington relative to foreign insurance companies doing business within said State of Washington.

III.

That between the 1st and 3rd days of February, 1926, both inclusive, Libellant was the sole owner of certain Used Camp Equipment of the aggregate reasonable value of sixty-one hundred (\$6100.00) dollars then and there on board certain railroad freight cars, as follows:

Used Camp Equipment on G. N. car No. 60054 of the reasonable value of one thousand (\$1,000.00) dollars;

Used Camp Equipment on G. N. car No. 62487 of the reasonable value of twelve hundred (\$1200.00) dollars;

(Amended Libel—Cause No. 5538)

Used Camp Equipment on G. N. car No. 61114 of the reasonable value of nine hundred (\$900.00) dollars;

Used Camp Equipment on G. N. car No. 60152 of the reasonable value of three thousand (\$3,000.00) dollars;

all of which said Used Camp Equipment on said cars aforesaid Libellant caused to be delivered to and laden aboard car barge known as car barge Chesley No. 1, then lying at Potlatch, Washington, then and there operated by Chesley Tug & Barge Co., a corporation, as sole owner thereof, in connection with and in tow of the Tug Ketchikan II, operated by Libellant as sole owner thereof, for transportation on said barge in tow of said tug from Potlatch to Seattle, Washington, under and according to a tariff schedule issued by said Chesley Tug & Barge Co. as a carrier by water known as tariff schedule C. T. & B. Co. No. 6, W. D. P. W. (Washington Department of Public Works No. 6), then and there in force under the authority and approval of the Public Service Commission of the State of Washington by virtue of authority vested in said Commission under the laws of the State of Washington.

IV.

That thereafter, on or about February 2, 1926,

(Amended Libel—Cause No. 5538)

and at the request of Libellant, by certificate of insurance No. 74396, dated February 2, 1926, and issued at Seattle by Respondent in consideration of the agreed premium to be paid Respondent by Libellant, Respondent insured Libellant in the sum of \$6100.00 on all of said Used Camp Equipment valued at \$6100.00, "laden on said vessel or car barge Chesley No. 1 in tow of said tug Ketchikan II," at and from Potlatch to Seattle, Washington, loss, if any, payable at Seattle to the assured or order upon surrender of said certificate properly endorsed and receipted, subject to the terms and conditions of the regular F. P. A. English form of cargo policy issued by Respondent, in said certificate expressly referred to, wherein and whereby Respondent agreed to indemnify Libellant against the adventures and perils of the sea and all other perils, losses and misfortunes that should come to the hurt, detriment or damage of said Used Camp Equipment or any part thereof, and wherein and whereby it was expressly stipulated that said insurance was understood and agreed to be subject to English law and usage as to liability for and settlement of any and all claims; which certificate of insurance together with said F. P. A. English form of cargo policy constitute the entire contract of said marine insurance, copies of which said certificate of insur-

(Amended Libel—Cause No. 5538)

ance and of said F. P. A. English form of cargo policy are hereto attached marked Exhibit "A" and "B", respectively, hereby referred to and by such reference expressly made a part hereof.

V.

That on February 2, 1926, said tug Ketchikan II departed from Potlatch, Washington, with said car barge in tow, on her said voyage to Seattle, all of said Used Camp Equipment in said Great Northern cars being laden on said car barge as a part of her cargo and as a part of the cargo of said car barge used in connection with and in tow of said tug Ketchikan II; and thereafter and during the currency of said contract of insurance, to-wit: on February 3, 1926, and while said car barge with all of said Used Camp Equipment laden on board thereof in tow of said tug as aforesaid was on her said voyage, in the waters of Puget Sound, said tug with said barge, laden with said Used Camp Equipment in Great Northern cars as aforesaid, met with tempestuous weather and winds and waves which caused the barge to spill all of said Great Northern cars with all of said Used Camp Equipment into the waters of Puget Sound and the same thereby became a total loss.

VI.

That thereafter and in the month of February, 1926, said Libellant tendered to said Respondent the

(Amended Libel—Cause No. 5538)

sum of (\$.....)
 dollars lawful money of the United States, at Seattle, Washington, in full payment of the premium due under the terms of said contract of insurance, but said Respondent refused to accept the same.

VII.

That thereafter Libellant promptly presented to Respondent, in writing, due notice and proof of said loss and made demand on Respondent for payment of said insurance, but Respondent has at all times refused and still refuses to pay the amount of said insurance or any part thereof, and there is now due and owing thereon from Respondent to Libellant the said sum of Sixty-one hundred (\$6100.00) dollars together with interest thereon from February 3rd, 1926, at the rate of six per cent per annum.

VIII.

That the law and usage of England in force February 2, 1926, and at all times thereafter material to this action, provided, *inter alia*; As set forth in An Act to Codify the Law relation to Marine Insurance, of December 21, 1906, known as 6 Edw. 7 c. 41, the text of which Act is set forth at large in Appendix A, Arnould on Marine Insurance and Average, 10th Ed. London. Stevens & Sons, Ltd., 119 and 120 Chancery Lane, W. C. 2; Sweet & Maxwell, Ltd., 3 Chancery Lane, W. C. 2, Law Publish-

(Amended Libel—Cause No. 5538)

ers, 1921; reference to which is hereby made and by such reference the same is expressly made a part hereof as though particularly pleaded.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore Libellant prays that a monition in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Respondent herein citing it to appear and answer in the premises, and that a decree may be entered herein in favor of Libellant and against Respondent for the sum of sixty-one hundred (\$6100.00) dollars together with interest thereon from February 3, 1926, at the rate of six per cent per annum, and for Libellant's costs and disbursements in this action, and that the Court will grant to Libellant such other and further relief as in justice it may be entitled to receive.

A. GUTHRIE & CO., INC.,

Libellant,

WILLIAM H. GORHAM,

Proctor for Libellant.

(Amended Libel—Cause No. 5538)

STATE OF WASHINGTON, COUNTY OF KING, SS.

W. R. Chesley, being first duly sworn, on oath deposes and says: That he is the Agent of A. Guthrie & Co., Inc., the above named Libellant; that he has read the foregoing libel, knows the contents thereof and believes the same to be true, and that he makes this affidavit on behalf of Libellant for the reason that none of the officers of said Libellant is now within the Western District of Washington.

W. R. CHESLEY.

Subscribed and sworn to before me this 3d day of February, 1927.

WILLIAM H. GORHAM,
Notary Public in and for the State
of Washington, residing at Seattle.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

Feb. 4, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION
IN ADMIRALTY

No. 5538

A. GUTHRIE & CO., INC.,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

ANSWER

To the Honorable E. E. Cushman, Judge of the
above entitled Court:

The answer of the Standard Marine Insurance
Company, Ltd., Respondent above named, to the
amended libel of A. Guthrie & Co., Inc., Libellant
above named, in a cause of contract, civil and mari-
time, respectfully shows:

I.

Respondent admits the allegations of the first
article of said amended libel.

II.

Respondent admits the allegations of the second
article of said amended libel.

III.

Respondent has no knowledge or information
sufficient to form a belief as to the ownership of the

(Answer—Cause No. 5538)

used camp equipment mentioned in the third article of said amended libel, and therefore does not admit ownership in said Libellant; however, it does admit all other allegations of said article.

IV.

Respondent admits the allegations of the fourth article of said amended libel.

V.

Respondent admits the allegations of the fifth article of said amended libel, but denies that said tug, with said barge, laden with said used camp equipment, “met with tempestuous weather and winds and waves which caused the barge to spill all of said Great Northern cars with all of said used camp equipment into the waters of Puget Sound and the same thereby became a total loss”.

VI.

Respondent admits the allegations of the sixth article of said amended libel.

VII.

Answering the allegations of the seventh article of said amended libel, Respondent admits that Libellant presented in writing due notice and proof of said loss and made demand for payment of insurance, and that Respondent has at all times refused and still refuses to pay the amount of said insurance or any part thereof, but denies that there

(Answer—Cause No. 5538)

is now due and owing thereon from Respondent to Libellant the sum of \$6100.00, or any sum at all.

VIII.

Answering the eighth article of said amended libel, Respondent admits the allegations thereof.

IX.

Respondent admits the allegations of the ninth article of said amended libel.

For a separate and affirmative defense the said Respondent alleges:

I.

That on the 2nd day of February, 1926, at the time when the locomotive crane and idler car mentioned in Libellant's amended libel were loaded on board the said barge Chesley No. 1 at Potlatch, Washington, the said barge was unseaworthy in that she was not tight, staunch and strong, but on the contrary leaked, admitting the entry of sea water into her holds to such an extent that said barge could not on said 2nd day of February, 1926, nor for a long time prior thereto carry an ordinary and reasonable load without being pumped out while on the voyage by the tug having said barge in tow; that said barge so loaded had to be so pumped out about every seven or eight hours.

II.

That at the time said barge sailed from Potlatch

(Answer—Cause No. 5538)

on the voyage mentioned in said amended libel she was unseaworthy for the reason that she was overloaded.

III.

That at the time said barge sailed from Potlatch on the voyage mentioned in said amended libel she was unseaworthy for the reason that she was laden with not only the locomotive crane upon its own wheels and said idler car, but also other railway cars heavily laden, none of which cars, (including the locomotive crane on its own wheels) were securely and adequately fastened upon said barge, in that their brakes were not set and they were allowed to rest, on rails laid upon and fastened to the deck of said barge, without jacks, shores, rail clamps or any of the other usual and necessary devices for securing and fastening such cars upon car barges for transportation upon voyages such as the one in question; that the failure to so adequately secure said cars rendered the same loose and liable to shift and go overboard on either the vessel taking water or meeting ordinary seas or winds.

IV.

That if said locomotive crane was lost overboard while upon said voyage it was lost because of the said unseaworthy condition of said barge, and/or said overloading of said barge, and/or said improper stowage of said barge.

(Answer—Cause No. 5538)

All and singular the premises are true.

WHEREFORE Respondent prays that the amended libel may be dismissed with costs, and for such other and further relief as may be just.

COSGROVE & TERHUNE,

Proctors for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—SS.

BRUNO HERMANN, being first duly sworn on his oath, deposes and says: That he is agent of the Respondent above named, and authorized to verify this answer on behalf of said Respondent; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

BRUNO HERMANN.

Subscribed and sworn to before me this 5th day of February, 1927.

(Seal)

HOWARD G. COSGROVE.

Notary Public in and for the State of Washington, residing at Seattle.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

Sep. 14, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION
IN ADMIRALTY

No. 5538

A. GUTHRIE & CO., INC.,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

STIPULATION RELATING TO CONSOLIDA-
TION, PLEADINGS AND TESTIMONY

It is hereby stipulated and agreed by and be-
tween the parties hereto:

(1) That this cause may be, for the purpose
of trial, consolidated with Cause No. 5539 in this
court, in admiralty, wherein Chesley Tug & Barge
Co., a corporation, is Libellant, and the Standard
Marine Insurance Company, Ltd., a corporation, is
Respondent.

(2) That the interrogatories and answers to
interrogatories propounded and returned in said
cause No. 5539 shall be considered interrogatories
and answers to interrogatories in this cause, with
the same effect and force as if propounded and re-
turned herein.

(3) That Article III of Respondent's separate and affirmative defense (set forth in its answer to Libellant's amended libel) may be amended by interlineation, adding after the word "that" in the seventh line of said article the words "their brakes were not set and,".

DATED at Seattle, Wash., this 19th day of September, 1927.

WILLIAM H. GORHAM,
Proctor for Libellant.
COSGROVE & TERHUNE,
Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

Sep. 28, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.
IN ADMIRALTY

No. 5539

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

SECOND AMENDED LIBEL

To The Honorable E. E. Cushman, Judge of the
above entitled court:

The second amended libel of Chesley Tug & Barge Company, a corporation, of Seattle, Washington, against the Standard Marine Insurance Company, Ltd., a corporation, of Liverpool, England, in a cause of contract, civil and maritime alleges as follows:

I.

That the Libellant during all the time herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and during all of said times owned the car-barge Chesley No. 1, without power,

(Second Amended Libel—Cause No. 5539)

and the tug Ketchikan II, and managed and operated said car-barge in connection with said tug as an agency for the public use in the conveyance of property for hire over and upon waters within the State of Washington as a common carrier under the Public Service Commission law of the State of Washington under a tariff schedule known and designated as C. T. B. Co. No. 6, W. D. P. W. No. 6, filed with and approved by the Public Service Commission of the State of Washington and kept open by Libellant to the public inspection under said Public Service Commission law.

II.

That the Respondent at all the times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of Great Britain, writing marine insurance and licensed and authorized by the State of Washington to do and doing a marine insurance business in the State of Washington and has complied with the statutes of the State of Washington relative to foreign insurance companies doing business within said state.

III.

That the City of Tacoma at all the times herein mentioned was and now is a municipal corporation of the first class within the County of Pierce in said State of Washington, and as such had, during

(Second Amended Libel—Cause No. 5539)

all of said times, and has all the rights and powers of a city of the first class of said state under and by virtue of the authority of the constitution and laws of the State of Washington.

IV.

That on or about May 25, 1925, and at all times thereafter material to this cause, Frank Sussman was doing business as Frank Sussman & Company at Tacoma, Washington, and was the owner of a certain locomotive crane on its own wheels then and there situated at Tacoma, Washington.

V.

That on or about May 25, 1925, said Frank Sussman doing business as aforesaid and said City of Tacoma acting by and through its lawful servants and representatives under and by virtue of Ordinance No. 8036 of said City of Tacoma, entitled "Ordinance No. 8036. An Ordinance authorizing the Commissioner of Light and Water to proceed with the construction of the first installation of hydroelectric power unit No. 2 of the City of Tacoma; provide for the issuance and sale of negotiable bonds of the City of Tacoma in the sum of \$4,000,000.00 to pay the cost thereof; and creating and establishing a special fund for the payment of said bonds and the interest thereon", duly passed by the said City of Tacoma and published in the

(Second Amended Libel—Cause No. 5539)

manner and for the time prescribed by law, entered into an oral agreement whereby: Said Sussman rented said crane to said City of Tacoma for its own use and benefit in connection with the first installation of hydroelectric power unit No. 2 of its Cushman Power Project, so-called, under said Ordinance, at the monthly rental of \$350.00 per month, to be paid by said City of Tacoma during the time said crane should be in its possession thereunder and until its redelivery to said owner at Tacoma, Washington; and whereby said City of Tacoma agreed to take delivery forthwith of said crane at Tacoma, Washington, for its use in connection with its said Cushman Power Project and to pay said rental to said owner for and during the time it should remain in possession of said crane and until its redelivery to said owner, and at its convenience to redeliver same to owner.

VI.

That said City of Tacoma on or about May 25, 1925, took delivery and possession of said crane and thereafter at all times up to the time of the loss thereof hereinafter mentioned remained in possession thereof and paid rent monthly to said Sussman therefor under said oral agreement, and during all of said times last aforesaid by virtue of its possession under said oral agreement it was the lawful

(Second Amended Libel—Cause No. 5539)

bailee thereof and as such had an insurable interest therein.

VII.

That on or about June 27, 1925, at Tacoma, Washington, said Frank Sussman doing business as aforesaid delivered his written offer of date June 27, 1925, to said City of Tacoma whereby said Frank Sussman doing business as aforesaid offered to sell said crane to said City of Tacoma for a valid consideration therein named, and whereby said Frank Sussman doing business as aforesaid granted said City of Tacoma an option to buy the same; which said offer and option was at all times thereafter up to the time of the said loss of said crane a valid and subsisting offer, unacted upon by Libellant's assignor, and by virtue thereof, together with its possession thereof as aforesaid, said City of Tacoma at all times subsequent to June 27, 1925, up to and including the time of said loss of said crane had an insurable interest in the same; a copy of which written offer is hereto attached marked Exhibit "A", hereby referred to and by such reference made a part hereof; and that said written offer was not based on any consideration running from said City of Tacoma to said Frank Sussman.

VIII.

That on or about February 2, 1926, at Potlatch, Washington, said City of Tacoma, the lawful bailee

(Second Amended Libel—Cause No. 5539)

of and in possession of said crane under said oral agreement for hire, with Libellant's consent, caused the same to be delivered to and laden on said car-barge Chesley No. 1, then and there being operated and managed in connection with said tug Ketchikan II by Libellant as a common carrier as an agency for public use in the transportation and conveyance of property for hire, as aforesaid, for transportation from Potlatch to Seattle under said tariff schedule No. 6, then and therein force; and at the same time an idler car, that is, a railway car designated B. & O. 253952, was as a necessary idler in connection with said crane on its own wheels as laden on said car-barge, delivered to and laden on said car-barge for transportation from Potlatch to Seattle.

IX.

That thereafter, on or about February 2, 1926, and at the request of said City of Tacoma, by certificate of insurance No. 74397, dated Seattle, February 2nd, 1926, and issued by Respondent, in consideration of the agreed premium to be paid to Respondent by said City of Tacoma, said Respondent insured Tacoma City Light Department, a department of said City of Tacoma, in the sum of Fifteen Thousand (\$15,000.00) Dollars on said locomotive crane on its own wheels, including said idler car B. & O. 253952, valued at Fifteen Thousand

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(\$15,000.00) Dollars laden on the said vessel or car-barge Chesley No. 1 in tow of said tug Ketchikan II, at and from Potlatch to Seattle, Washington, loss, if any, payable at Seattle to the assured or order upon surrender of said certificate properly endorsed and receipted, subject to the terms and conditions of the regular F. P. A. English form of cargo policy issued by said Respondent, in said certificate expressly referred to, wherein and whereby said Respondent agreed to indemnify said City of Tacoma against the adventures and perils of the sea and all other perils, losses and misfortunes that should come to the hurt, detriment or damage of said locomotive crane or said idler car, or any part thereof, and wherein and whereby it was expressly stipulated that said insurance was understood and agreed to be subject to English law and usage as to liability for and settlement of any and all claims; a copy of which certificate of insurance and of said F. P. A. English form of cargo policy are hereto attached, marked Exhibits "B" and "C", respectively, hereby referred to and by such reference expressly made a part hereof; and that by inadvertence and mistake Respondent in issuing said certificate of insurance failed to delete therefrom in the printed form thereof as issued to Libellant's assignor the express reference therein to an open policy, there being in fact no such open policy under which said certificate

(Second Amended Libel—Cause No. 5539)

was issued; and said contract of insurance as between assurer and assured being evidenced solely by said certificate of insurance and the regular F. P. A. English form of cargo policy expressly referred to therein.

That by inadvertence on the part of said City of Tacoma said idler car was by description included in and covered by said certificate of insurance when in truth and in fact said City of Tacoma had no insurable interest in said car.

That the total insurable value of said locomotive crane on its own wheels and said idler car, described in said certificate of insurance as the subject matter thereof, on February 2, 1926, and on the day of loss thereof, was the sum of Fifteen Thousand (\$15,000.00) Dollars; and that the insurable value of said locomotive crane on its own wheels at said time was the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars or five-sixths of said total insurable value of fifteen thousand dollars; and that the insurable value of said idler car at said times was the sum of Two Thousand Five Hundred (\$2,500.00) Dollars or one-sixth of said total insurable value of fifteen thousand dollars.

X.

That on February 2, 1926, said tug Ketchikan II departed from Potlatch, Washington, with said

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car-barge in tow on her said voyage to Seattle, said locomotive crane on its own wheels and said idler car being laden on said car-barge as a part of her cargo and as part of the cargo of said car-barge operated in connection with and in tow of said tug; and thereafter and during the currency of said contract of insurance, to-wit: on February 3, 1926, and while said car-barge with said locomotive crane on its own wheels and said idler car laden on board thereof in tow of said tug as aforesaid was on her said voyage, in the waters of Puget Sound, said car-barge and said tug met with tempestuous weather, winds and waves which caused said car-barge to spill said crane and idler car into the waters of Puget Sound and the same thereby became a total loss.

XI.

That thereafter and in the month of February, 1926, said City of Tacoma tendered to said Respondent the sum of Sixty (\$60.00) Dollars, lawful money of the United States, at Seattle, Washington, in full payment of the premium due under the terms of said contract of insurance.

XII.

That thereafter and in the month of February, 1926, said City of Tacoma presented to Respondent notice of claim and proof of said loss under said certificate of insurance, including claim for loss of

(Second Amended Libel—Cause No. 5539)

said idler car covered thereby as well as said locomotive crane on its own wheels; and thereafter, in the month of March, 1926, said City of Tacoma offered in writing to accept from Respondent the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars as covering the loss of said locomotive crane under said certificate of insurance, waiving any interest in the sum of Two Thousand Five Hundred (\$2,500.00) Dollars insurance on said idler car; and thereafter on March 11, 1926, Respondent in writing to said City of Tacoma denied any and all liability under said certificate of insurance not only for said idler car but also for said locomotive crane; and thereafter in the month of July, 1926, Libellant as assignee of said certificate of insurance as hereinafter set forth presented in writing due notice, claim and proof of loss of said locomotive crane in the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars; but that Respondent has at all times refused and still refuses to pay to said City of Tacoma or to Libellant as assignee of said certificate of insurance the amount of said insurance under said certificate, or the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars thereof, or any part thereof, and there is now due and owing from Respondent to Libellant as assignee of said certificate of insurance the sum of Twelve Thousand Five Hundred

(Second Amended Libel—Cause No. 5539)

(\$12,500.00) Dollars with interest thereon from February 3, 1926, at the rate of six per cent (6%) per annum.

XIII.

That pursuant to an ordinance of said City of Tacoma No. 8829 entitled: "An Ordinance authorizing and directing the City Comptroller to sell certificate of insurance No. 74397 of the Standard Marine Insurance Company, Ltd., of Liverpool, England, dated Seattle, February 2, 1926, issued to Tacoma City Light Department as the assured and covering locomotive crane on its own wheels, including idler car B. & O. 253952, and declaring that this ordinance shall take effect immediately after its publication," duly passed by said City of Tacoma on June 2, 1926, and thereafter, on June 4, 1926, duly published in the manner and for the time prescribed by law, and pursuant to public notice of sale thereunder given by the City Comptroller of the said City of Tacoma, said City Comptroller, at the hour of ten o'clock A. M. of June 16, 1926, at his office in the City Hall, in the City of Tacoma, State of Washington, sold all the right, title and interest of said City of Tacoma in and to said certificate of insurance and of all moneys due or to become due thereunder, to Libellant, Libellant then and there being the highest and best bidder for cash

(Second Amended Libel—Cause No. 5539)

in the sum of Seventy-Five Hundred (\$7500.00) Dollars at said sale; and thereafter, on June 16, 1926, pursuant to said ordinance and in consideration of said sum of \$7500.00 paid by Libellant to said City of Tacoma in lawful money of the United States, said City of Tacoma by endorsement thereon assigned and transferred and set over unto Libellant all right, title and interest of said City of Tacoma in and to said certificate of insurance and of all moneys due or to become due thereunder, subject to the terms and conditions in said ordinance prescribed, and thereafter, on June 16, 1926, delivered said certificate of insurance so assigned as aforesaid to Libellant, who ever since has been and now is the legal owner and holder thereof by virtue of said sale and assignment; a copy of which said assignment is hereby annexed marked Exhibit "D", hereby referred to and by such reference expressly made a part hereof.

XIV.

That the law and usage of England in force February 2, 1926, and at all times thereafter material to this action, provided, *inter alia*: As set forth in An Act to Codify the Law relating to Marine Insurance, of December 21, 1906, known as 6 Edw. 7 c. 41, the text of which Act is set forth at large in Appendix A, Arnould on Marine Insurance and

(Second Amended Libel—Cause No. 5539)

Average, 10th Ed., London. Stevens & Sons, Ltd., 119 and 120 Chancery Lane, W. C. 2; Sweet & Maxwell, Ltd., 3 Chancery Lane, W. C. 2; Law Publishers, 1921; and as set forth in the decisions and excerpts therefrom of the courts of law and equity, including courts of admiralty, of England, relating to marine insurance as the same appear in published Reports purporting to be Reports of the decisions of such courts, or of the United Kingdom of Great Britain and Ireland, later decisions prevailing over decisions of an earlier date, and decisions of appellate courts or tribunals including the House of Lords, sitting in a judicial capacity, and the Judicial Committee of the Privy Council, prevailing according to appellate jurisdiction, over the lower or inferior courts; and said Marine Insurance Act of 1906 prevailing over decisions of courts of an earlier date than December 21, 1906, in conflict therewith; reference to which acts and reports is hereby made and by such reference the same are expressly made a part hereof as though particularly pleaded herein.

XV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore Libellant prays that a monition in due form of law according to the practice of this

(Second Amended Libel—Cause No. 5539)

Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Respondent herein citing it to appear and answer in the premises, and that a decree may be entered herein in favor of Libellant and against Respondent in the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars, together with interest thereon from February 3, 1926, at the rate of six per cent per annum, and for Libellant's costs and disbursements in this action, and that the Court will grant to Libellant such other and further relief as in justice it may be entitled to receive.

CHESLEY TUG & BARGE CO.,

Libellant.

WILLIAM H. GORHAM,

Proctor for Libellant.

June 27, 1925.

MR. B. R. NICHOLS, Pur. Agt.,

Light Dept., City of Tacoma,

Tacoma, Washington.

Dear Sir:

We will sell to the City of Tacoma, the Link-Belt crane, now in the possession of the City at the Cushman Power Plant site, for a sum equivalent to the manufacturer's price for a new crane of like size and type, less five thousand dollars.

We hereby grant to the said City of Tacoma

(Second Amended Libel—Cause No. 5539)

an option on said crane, it being understood that should the city decide to buy the crane, we will allow any sums paid as rental on said crane for a period not to exceed six months to apply as part of the purchase price.

Yours very truly,

FRANK SUSSMAN & COMPANY,

By Frank Sussman.

EXHIBIT "A."

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Endorsement on Certificate of Insurance No. 74397 issued by Standard Marine Insurance Company, Ltd., at Seattle, February 2, 1926, to Tacoma City Light Department as assured:

For value received, the City of Tacoma hereby assigns, transfers and sets over unto the Chesley Tug & Barge Company, a corporation, of Seattle, Washington, all the right, title and interest of the City of Tacoma in and to the within certificate of insurance and of all moneys due or to become due thereunder. And it is expressly stipulated that the assignee of this certificate of insurance may at its option in its own name or in the name of the City of Tacoma, but at its sole and exclusive cost and expense, institute and prosecute to final judgment or decree any and all suits and proceedings in any and all courts thereunder against the insurer under said certificate of insurance.

This assignment is subject to all the terms and conditions of Ordinance No. 8829 of the City of Tacoma, passed June 2, 1926.

IN WITNESS WHEREOF, the City of Tacoma has executed this assignment by its officers thereunto duly authorized this 16th day of June, 1926.

CITY OF TACOMA.

By M. G. TENNANT,

Mayor.

Attest:

GENEVIEVE MARTIN,
City Clerk.

Countersigned this 16th day of June, 1926.

CARL G. CADDEY,
City Comptroller.
(Corporate Seal)
By P. H. PALMER,
Deputy.

EXHIBIT "D."

STATE OF WASHINGTON, COUNTY OF KING—SS.

W. R. CHESLEY, being first duly sworn, on oath deposes and says: That he is the duly elected, qualified and acting President of the Chesley Tug & Barge Company, a corporation, the above named Libellant; that he has read the foregoing Second Amended Libel, knows the contents thereof and believes the same to be true.

W. R. CHESLEY.

Subscribed and sworn to before me this 30th day of October, 1926.

WILLIAM H. GORHAM,
Notary Public in and for the State
of Washington, residing at Seattle.
Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

November 1, 1926.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON.
SOUTHERN DIVISION.
IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE CO., a corporation,
Libellant,
vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,
Respondent.

EXCEPTIONS TO AMENDED LIBEL.

Comes now the above named Respondent, by its proctors, Cosgrove & Terhune, and excepts to the amended libel of the Chesley Tug & Barge Co. herein, in the following particulars:

I.

Articles V and VI of Libellant's amended libel do not state facts sufficient to show an insurable interest in the City of Tacoma, alleged assignor of Libellant, in and to the locomotive crane mentioned in said libel at the time said locomotive crane is therein asserted to have been lost, to-wit: on February 3, 1926.

II.

Article VII of said amended libel is insufficient, indistinct and lacking in fullness, in that, while it alleges that the offer therein mentioned was a valid

and subsisting offer (which is not an allegation of fact, but on the contrary a conclusion of law), it does not assert that said offer was given for a consideration, or that the said City of Tacoma did at any time accept said offer.

III.

Article VII of said amended libel does not allege facts sufficient to show an insurable interest in the City of Tacoma, alleged assignor of Libellant, in and to the said locomotive crane at the time of its said alleged loss.

IV.

That said amended libel does not allege facts sufficient to show an insurable interest in the City of Tacoma, alleged assignor of Libellant, in and to the locomotive crane mentioned in said libel at the time it is asserted to have been lost, or at any other time.

V.

That said amended libel does not state facts sufficient to constitute a cause of action.

COSGROVE & TERHUNE,

Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

October 9, 1926.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.
IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto that the exceptions of Respondent to the amended libel herein may stand as and for Respondent's exceptions to the second amended libel herein with the same force and effect as though expressly addressed to said second amended libel.

Dated, Seattle, Washington, October 30, 1926.

WILLIAM H. GORHAM,

Proctor for Libellant.

COSGROVE & TERHUNE,

Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

November 1, 1926.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.

No. 5539.

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

MEMORANDUM RULING ON EXCEPTIONS
TO SECOND AMENDED LIBEL.

FILED NOV. 18, 1926.

WILLIAM H. GORHAM, Seattle,
Proctor for Libellant.

COSGROVE & TERHUNE, Seattle,
Proctors for Respondent.

CUSHMAN. (D. J.)

This suit is one in admiralty to recover upon a policy of marine insurance. The second amended libel alleges that by inadvertence and mistake the Respondent in issuing the certificate of insurance failed to delete from the printed form issued, the reference therein to an open policy; that the contract of insurance was evidenced solely by a certificate of insurance and the regular F. P. A. English form cargo policy. A part of the prayer is for such other and further relief as in justice Libellant may be entitled to receive.

From the foregoing it would appear Libellant seeks to have the contract of insurance reformed—that is, seeks equitable relief. I find nothing in the briefs touching the jurisdiction of the Court, in admiralty, to reform a contract, neither do I recall anything having been said upon that point in the argument. Before considering further the Exceptions to the Libel, the Court wishes to be advised as to the contention of the parties herein upon this question, and the case will be noted for hearing upon the point by either Libellant or Respondent; and the Clerk will notify them of this ruling.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY,

a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-

PANY, LTD., a corporation,

Respondent.

STIPULATION.

It is hereby stipulated by the parties hereto:

FIRST: That for all purposes touching questions of law and of fact in the above entitled cause

the certificate of insurance and the regular F. P. A. English form of cargo policy, copies of which are referred to in and attached to the second amended libel in said cause as Exhibit "B" and Exhibit "C" respectively, constitute the entire contract of marine insurance alleged in said second amended libel; and that, notwithstanding the express reference in said certificate of insurance to an open policy, there never was any open policy issued or intended to be issued touching the insurance effected by said contract of marine insurance.

SECOND: That said second amended libel may be deemed as amended in accordance with the first paragraph of this stipulation.

THIRD: That no reformation of said contract shall be required or deemed necessary in said cause.

Dated November 26, 1926.

WILLIAM H. GORHAM,

Proctor for Libellant.

COSGROVE & TERHUNE,

Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

November 27, 1926.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DIS-
TRICT OF WASHINGTON,
SOUTHERN DIVISION.

No. 5539.

CHESLEY TUG & BARGE COMPANY,

a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

MEMORANDUM DECISION OVERRULING
EXCEPTIONS TO SECOND
AMENDED LIBEL.

FILED JAN. 21, 1927.

WILLIAM H. GORHAM, Seattle,
Proctor for Libellant.

COSGROVE & TERHUNE, Seattle,
Proctors for Respondent.

CUSHMAN, (D. J.)

The second amended libel has been, by stipulation, amended. This stipulation was made to meet the Court's question concerning jurisdiction—a question raised after argument of exceptions to the amended libel. This amendment by stipulation, as the Court understands, in no way interferes with the Court now ruling upon the exceptions argued and submitted.

Libellant cites: *The Fred E. Sander*, 212 Fed. 545, 6 Edw. 7, c. 41; *Lucena vs. Craufurd* (H. of L. 1806, 2 B. & F. 268, 302); *Hooper vs. Robinson*, 98 U. S. 528; *Phoenix Ins. Co. vs. Trans. Company*, 117 U. S. 312; *Harrison vs. Fortlage*, 161 U. S. 57; *Cooley's Briefs on Insurance*, 147-48; 21 Cyc. 557; *Munich Ins. Co. vs. Dodwell*, 128 Fed. 410; *Williamette Navigation Co. vs. Hartford Fire Ins. Co.*, 287 Fed. 464; *Fireman's Fund Ins. Co. vs. Globe Navigation Co.*, 236 Fed. 618; *Arnold on Marine Ins.*, 10 Ed. p. 501; *Eldridge on Marine Policies* (1924), p. 211; *City of Detroit vs. Detroit Ry. Co.*, 172 Mich. 314, 139 N. W. 56; *Crowley vs. Cohen*, 3 B & Ad., 478; *Eastern Railway Co. vs. Relief Fire Ins. Co.*, 98 Mass. 420.

Respondent cites: Admiralty Rule No. 22, Sup. Court, 38 C. J. 1172 (51-52); *M. S. Dollar S. S. Co. vs. Maritime Ins. Co.*, 149 Fed. 616; *Colburn vs. Washington State Art Assn.*, 80 Wash. 662; Subsection 1 of Sec. 5 of the English Marine Act, 1908; *Arnould on Marine Ins.* (10th Ed.), p. 1673; 6 C. J. 1122 (68), 1123 (70-71-72-73-74); *Sanderson vs. Collins* (1904), 1 K. B. 628; *McMahon vs. Field*, 7 Q. B. D., 591; *Batut vs. Hartley*, L. R. 7, Q. B. 594; *Firestone Tire & Rubber Co. vs. Pacific Transfer Co.*, 120 Wash. 665; *Williams vs. Lloyd* (1628), 82 E. R. 95; *Bird vs. Astock*, 2 Bulstroda 280, 80 reprint 1122; *Taylor vs. Caldwell* (1863), 32 L. J.

Q. B. 164, 8 L. T. 356; *Horlock vs. Beal* (1916), 1 A. C., p. 486; *Gow on Marine Ins.*, p. 78; *Wood on Fire Ins.*, 2nd Ed. 673.

In support of the ~~exemptions~~ ^{exceptions} it is urged that no insurable interest on the part of the Libellant's assignor is shown. The exceptions are overruled. *Phoenix Ins. Co. vs. Transportation Company*, 117 U. S. 312 to 323; *Munich Ins. Co. vs. Dodwell*, 128 Fed. 410; *Willamette Nav. Co. vs. Hartford Fire Ins. Co.*, 287 Fed. ~~411~~ 464.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

January 21, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.
IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY,

a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

ORDER OVERRULING EXCEPTIONS TO
AMENDED LIBEL.

This cause having come on regularly to be heard on Respondent's exceptions to the amended libel herein as further amended by stipulation of the parties dated November 26, 1926, filed herein,

The Court having heard argument of counsel for the respective parties and being fully advised in the premises,

IT IS ORDERED that said exceptions be and the same are hereby overruled; to which ruling of the Court Respondent excepts and its exception is allowed.

Dated, February 14th, 1927.

EDWARD E. CUSHMAN,

Judge.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

February 14, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

UNITED STATES DISTRICT COURT, WEST-
ERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY,

a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-

PANY, LTD., a corporation,

Respondent.

ANSWER.

To the Honorable E. E. Cushman, Judge of the
above entitled Court:

The answer of the Standard Marine Insurance
Company, Ltd., Respondent above named, to the
second amended libel of Chesley Tug & Barge Com-
pany, Libellant above named, in a cause of contract,
civil and maritime, respectfully shows:

I.

Respondent admits the allegations of the first
article of the second amended libel herein.

II.

Respondent admits the allegations of the second
article of the second amended libel herein.

III.

Respondent admits the allegations of the third
article of the second amended libel herein.

(Answer—Cause No. 5539)

IV.

Respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the fourth article of the second amended libel herein.

V.

Respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the fifth article of the second amended libel herein.

VI.

Respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of the second amended libel herein; however, the said respondent alleges that if the said City of Tacoma was the bailee for hire of said crane, as alleged by Libellant, that the said City of Tacoma had ceased using and did not intend further to use said crane for the purpose for which it was bailed, and was at the time of its alleged loss returning the said crane to the alleged bailor.

VII.

Respondent denies the allegations of the seventh article of said second amended libel.

VIII.

Answering the eighth article of said second amended libel Respondent admits that the said City

(Answer—Cause No. 5539)

of Tacoma on or about February 2, 1926, then being the bailee for hire of said crane and in possession thereof, caused the same to be delivered to and laden upon the said car-barge Chesley No. 1, then and there being operated as alleged, and for transportation from Potlatch to Seattle as alleged, and further that there was also delivered to and laden upon said car-barge an idler as alleged. All other allegations in said article are denied.

IX.

Respondent admits all of the allegations of the first paragraph of the ninth article of said second amended libel, except the allegation "that by inadvertence and mistake Respondent in issuing said certificate of insurance failed to delete therefrom in the printed form thereof as issued to Libellant's assignor the express reference therein to an open policy," which said quoted allegation respondent denies.

Respondent admits the allegations of the second paragraph of the ninth article of said second amended libel.

Respondent denies each and every allegation of the last paragraph of said ninth article, and particularly that the insurable value of said locomotive crane on its own wheels at the time mentioned in

(Answer—Cause No. 5539)

said paragraph was the sum of \$12,500.00, or any sum greater than \$7,500.00.

X.

Respondent admits the allegations of the tenth article of said second amended libel, except that it denies that “said car-barge and said tug met with tempestuous weather, winds and waves which caused said car-barge to spill said crane and idler car into the waters of Puget Sound and the same thereby became a total loss.”

XI.

Respondent admits the allegations of the eleventh article of said second amended libel.

XII.

Respondent admits the allegations of the twelfth article of said second amended libel, except, however, that it denies that “there is now due and owing from Respondent to Libellant as assignee of said certificate of insurance the sum of \$12,500.00,” or any sum at all.

XIII.

Respondent denies the allegations of the thirteenth article of said second amended libel.

XIV.

Respondent admits the allegations of the fourteenth article of said second amended libel.

XV.

Respondent admits the allegations of the fifteenth article of said second amended libel.

(Answer—Cause No. 5539)

For a separate and affirmative defense the said Respondent alleges:

I.

That on the 2nd day of February, 1926, at the time when the locomotive crane and idler car mentioned in Libellant's second amended libel were loaded on board the said barge Chesley No. 1 at Potlatch, Washington, the said barge was unseaworthy in that she was not tight, staunch and strong, but on the contrary leaked, admitting the entry of sea water into her holds to such an extent that said barge could not on said 2nd day of February, 1926, nor for a long time prior thereto carry an ordinary and reasonable load without being pumped out while on the voyage by the tug having said barge in tow; that said barge so loaded had to be so pumped out about every seven or eight hours.

II.

That at the time said barge sailed from Potlatch on the voyage mentioned in said second amended libel she was unseaworthy for the reason that she was overloaded.

III.

That at the time said barge sailed from Potlatch on the voyage mentioned in said second amended libel she was unseaworthy for the reason that she was laden with not only the locomotive crane upon

(Answer—Cause No. 5539)

its own wheels and said idler car, but also other railway cars heavily laden, none of which cars, (including the locomotive crane on its own wheels) were securely and adequately fastened upon said barge, in that their brakes were not set and they were allowed to rest on rails laid upon and fastened to the deck of said barge, without jacks, shores, rail clamps or any of the other usual and necessary devices for securing and fastening such cars upon car barges for transportation upon voyages such as the one in question; that the failure to so adequately secure said cars rendered the same loose and liable to shift and go overboard on either the vessel taking water or meeting ordinary seas or winds.

IV.

That if said locomotive crane was lost overboard while upon said voyage it was lost because of the said unseaworthy condition of said barge, and/or said overloading of said barge, and/or said improper stowage of said cargo.

All and singular the premises are true.

WHEREFORE respondent prays that the second amended libel may be dismissed with costs, and for such other and further relief as may be just.

COSGROVE & TERHUNE,

Proctors for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—SS.

BRUNO HERMANN, being first duly sworn on his oath, deposes and says: That he is agent of the Respondent above named, and authorized to verify this answer on behalf of said Respondent; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

BRUNO HERMANN. /

Subscribed and sworn to before me this 16th day of February, 1927.

HOWARD G. COSGROVE,

Notary Public in and for the State
of Washington, residing at Seattle.

(Seal)

INTERROGATORIES PROPOUNDED TO
LIBELLANT TO BE ANSWERED
BY ONE OF ITS OFFICERS
UNDER OATH.

1. When was the barge Chesley No. 1 built, give her construction, tonnage (gross and net), and dimensions?

2. (a) Please list all of the voyages of said barge between November 1, 1925, and February 2, 1926, giving the ports of sailing and destination, dates of sailing and with what cargo loaded.

(b) Please give the name of the tug towing said barge on each of said voyages, give also the name of the then owner and master of each of said tugs.

(Interrogatories—Cause No. 5539)

(c) What weather did said barge encounter on each of said voyages?

(d) Did barge take water on any of these voyages? If so, what voyages, and how much water and under what circumstances.

(e) Did barge have to be pumped out during the period of November 1, 1925, to February 2, 1926? If so, when?

(f) Did said barge have to be pumped out on any of said voyages? If so, upon what voyage, and when, and by what means was said pumping accomplished? How long did each of said pumping operations take?

(g) Please produce at the trial of this action the original log books covering said voyages of each of the tugs towing said barge upon said voyages, attach hereto the copies of all entries in said log books relating to said voyages, giving the names and addresses of persons making such entries.

3. When was barge last caulked prior to February 2, 1926, what was the extent and character thereof, and by whom and where done?

4. When and where was said barge last on drydock prior to February 2, 1926? For what purpose was she on such drydock, and what was thereon done to said barge?

5. What collisions, strandings or accidents befell said barge during or upon any of said voyages,

(Interrogatories—Cause No. 5539)

or during said period of time; give detailed statement of effect thereof upon her hull, timbers and caulking?

6. What was done by way of hull repairs to said barge during said period, when and by whom?

7. (a) Of what did the cargo of the barge consist on the voyage beginning February 2, 1926, at Potlatch, Washington; if it consisted of railway cars, how many were there, what sizes and weights, and with what were they loaded; what was the approximate total weight of said cars and other cargo?

(b) How and where were said cars placed on said barge? The term "cars" used in this interrogatory includes said crane and idler.

(c) How were they fastened or secured to said barge in order to prevent their rolling or shifting?

(d) Were said cars secured with shores?

(e) Were said cars secured with jacks?

(f) Were said cars secured with rail clamps?

(g) If your answer is that said cars were secured with shores, jacks and/or rail clamps please describe the same, and state how many there were and where placed.

8. (a) Please produce at the time of trial the original log book of the tug *Ketchikan II*, showing all voyages made by the said *Ketchikan II* during

(Interrogatories—Cause No. 5539)

the period of November 1, 1925, to and including February 4, 1926, and attach hereto copies of all entries in said log books relating to any and all of said voyages.

(b) Upon said voyage beginning February 2, 1926, was said barge manned? If so, how, and by whom; did it have any pumping equipment of its own.

COSGROVE & TERHUNE,

Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

February 15, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
NORTHERN DIVISION.
IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

ANSWER OF LIBELLANT TO INTERROGA-
TORIES PROPOUNDED BY
RESPONDENT.

Answer to Interrogatory No. 1:

Built in 1913.

Construction: Wooden barge with
5 solid bulkheads and
5 trusses.

Tonnage: 193 gross and net.

Dimensions: 90' x 36' x 7',
Custom House measurement.
90' x 36' x 7' 8" over-all.

Answer to Interrogatory No. 2:

(a) Voyages of Chesley No. 1 between Novem-
ber 1, 1925, and February 2, 1926, ports
of departure and destination, dates of
sailing and cargoes, are as follows:

SCOW CHESLEY NO. 1—Nov. 1st, 1925, to Feb. 3rd, 1926.

1925	Date	Depart.	Arrival	Cargo	From	To	Tug
2598	11-4-9 A.M.	11-5-6 A.M.	11-5-6 A.M.	4 cars	Seattle	Potlatch	Tempest
	11-6 A.M.	11		3 cars	Potlatch	Seattle	Tempest
2610	11-8-1 P.M.	11-9-3 P.M.	11-9-3 P.M.	4 cars	Seattle	Potlatch	Ketchikan
	11-10-11 A.M.	11-10-10:20 P.	11-10-10:20 P.	4 cars	Potlatch	Seattle	{ Ketchikan V. Grubb }
2616	11-12-11:30 P.	11-13	11-13	2 cars	Seattle	Mud Bay	Tempest
	11-15-7 P.M.	11-16-7 A.M.	11-16-7 A.M.	1 car	Mud Bay	Seattle	Tempest
2625	11-17-Noon	11-18	11-18	2 cars	Seattle	Potlatch	Tempest
	11-19-4 A.M.	11-20-2 A.M.	11-20-2 A.M.	2 cars	Potlatch	Seattle	Tempest
2643	11-26-1 A.M.	11-26-11 A.M.	11-26-11 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
	11-27 P.M.	11-28 P.M.	11-28 P.M.	4 cars	Poulsbo	Seattle	Ketchikan
2653	11-29-1 A.M.	11-29-6 A.M.	11-29-6 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
	12-3	12-4-11:30 A.	12-4-11:30 A.	4 cars	Poulsbo	Seattle	Tempest
2664	12-6-6 A.M.	12-7-7 A.M.	12-7-7 A.M.	1 Loco.	Seattle	Dry Creek	Tempest
	12-9-10 A.M.	12-9-11 P.M.	12-9-11 P.M.	3 cars	Dry Creek	Potlatch	Tempest
2674	12-11-1 A.M.	12-12-Noon	12-12-Noon	4 cars	Potlatch	Seattle	Tempest
	12-13-3 A.M.	12-13-P.M.	12-13-P.M.	3 cars	Seattle	Dry Creek	Tempest
2677	12-15-3 A.M.	12-16-5 P.M.	12-16-5 P.M.	0 cars	Dry Creek	Seattle	Tempest
	12-17-5 A.M.	12-17-9 P.M.	12-17-9 P.M.	6 cars	Seattle	Dry Creek	Tempest
				3 cars	Dry Creek	Seattle	Tempest

2687	12-19 P.M.	12-20-7 P.M.	5 cars	Seattle	Potlatch	Potlatch	Tempest
	12-23 P.M.	12	4 cars	Potlatch	Seattle	Seattle	Tempest
2708	12-28-2 P.M.	12-29-6 A.M.	3 cars	Seattle	Dry Creek	Dry Creek	Tempest
	12-30-5 A.M.	12-30-6 P.M.	3 cars	Dry Creek	Seattle	Seattle	Tempest
2709	12-31-11 A.M.	1-1 A.M.	3 cars	Seattle	Dry Creek	Dry Creek	Tempest
	1926						
1926							
No.							
25	1-1 P.M.	1-2 P.M.	3 cars	Dry Creek	Seattle	Seattle	Tempest
	1-3-1 P.M.	1-4-2:30 P.M.	6 cars	Seattle	Mud Bay	Mud Bay	Tempest
	1-6-11 A.M.	1-7-12:20P.M.	Empty	Mud Bay	Seattle	Seattle	Ketchikan
31	1-29-2 A.M.	1-29-7 A.M.	4 cars	Seattle	Port Orchard	Port Orchard	Ketchikan
	1-29-4 A.M.	1-29-7 P.M.	0 cars	Port Orchard	Seattle	Seattle	Ketchikan
32	1-7-11 P.M.	1-9-1 A.M.	5 cars	Seattle	Potlatch	Potlatch	Lilloo No. 2
	1-9-10 A.M.	1-10-2 A.M.	0 cars	Potlatch	Seattle	Seattle	Lilloo No. 2
33	1-14-4 A.M.	1-15-6 A.M.	4 cars	Potlatch	Seattle	Seattle	Ketchikan
34	1-17-6 A.M.	1-18 A.M.	6 cars	{ Seattle { Potlatch	{ Potlatch { Dry Creek	{ Potlatch { Dry Creek	Ketchikan Ketchikan Ketchikan
	1-20-9 A.M.	1-22-1 A.M.	4 cars	Dry Creek	Seattle	Seattle	Ketchikan
35	1-25-2 A.M.	1-26	6 cars	Seattle	Potlatch	Potlatch	Ketchikan
	1-27-11 A.M.	1-28-4 A.M.	4 cars	Potlatch	Seattle	Seattle	Ketchikan
44	1-31-8 A.M.	2-1 A.M.	6 cars	Seattle	Potlatch	Potlatch	Ketchikan
	2-2-5:30 A.M.	2-3-8 A.M.	5 cars 1 Loco. Crane	Potlatch.	{ Lost off { Meadow Point	{ Lost off { Meadow Point	Ketchikan Ketchikan

Answer to Interrogatory No. 2—Continued:

- (b) Names of tugs, their owners and masters, towing on said voyages, are as follows:

Tug Ketchikan II.

Owners: Libellant.

Master: Nelson,

Address, care Libellant.

Tug Tempest.

Owners: Libellant.

Master: McDevitt, now deceased.

Tug Lillico No. 2.

Owner: Lillico Tug & Barge Co.

Master: Bert Thomas,

Address unknown.

- (c) Unknown to Libellant.

- (d) Not to Libellant's knowledge.

- (e) Not to Libellant's knowledge.

- (f) Not to Libellant's knowledge.

- (g) Log book of Ketchikan II from January 16, 1926, to February 2, 1926, and log book of tug Tempest from November 9, 1925, to February 2, 1926, now at office of proctor for Libellant subject to inspection by Respondent and its proctor. Present whereabouts of log book of tug Ketchikan II from November 1, 1925, to January 15, 1926, unknown to Libellant.

Names and addresses of persons making entries in said log books unknown to Libellant except as follows: Names and addresses of Masters of Ketchikan II and Tempest given in Answer to Interrogatory No. 2 (b).

Answer to Interrogatory No. 3:

October, 1923.

By Maritime Boat & Engine Works, Seattle, Washington.

Extent and character, see Answer to Interrogatory No. 4.

Answer to Interrogatory No. 4:

October, 1923.

Hauled, scraped, cleaned, scrubbed and copper painted bottom; took out nine planks in bottom and replaced, caulked and cemented seams; put on four planks and guards for chafing strake head end; took out piece of head log and replaced with new; took off rails and put on sheathing and replaced rails; took off rake guards and replaced; made new plug, took off, straightened and replaced corner irons; made new combing around hatches forward end; hawsed in and filled seams, and caulked where found necessary.

Answer to Interrogatory No. 5:

No collisions, strandings or accidents.

Answer to Interrogatory No. 6:

No hull repairs other than as shown in Answer to Interrogatory No. 4, except incidental repairs from time to time as occasion required.

Answer to Interrogatory No. 7:

- (a) Locomotive crane on its own wheels,
 weight 63 tons
 5 railway cars, weight each..... 20 tons
 1 car empty.
 1 car containing goods, weight, ex-
 clusive of car..... 42 tons
 1 car containing goods, weight, ex-
 clusive of car..... 19 tons
 1 car containing goods, weight, ex-
 clusive of car..... 8 tons
 1 car containing goods, weight, ex-
 clusive of car..... 38 tons
- (b) Crane and idler (empty railway car) placed
 on center track.
 2 railway cars on each outside track.
- (c) Across the after end was a 4x16 timber with
 a 12x12 timber on top bolted to the barge
 with several 1" bolts and four 1½" anchor
 bolts with 6" washers on them, in front of
 that another 12x12 timber, and in front
 of that, between that 12x12 timber and
 the wheels of the cars, would be usual
 railroad ties which were about 7x9 or

8x8 timbers to fill in the space between the 12x12 timber and the wheels of the car. On the other end of the scow we used timbers or a railroad tie across the track and another 8x8 timber or railroad tie under the journals of the car wedged in place with ship wedges, on each side.

- (d) No.
- (e) No.
- (f) No.
- (g) See above.

Answer to Interrogatory No. 8:

- (a) See Answer to Interrogatory No. 2 (g).
- (b) Barge not manned.

No pumping equipment of its own.

CHESLEY TUG & BARGE COMPANY,
Libellant.

WILLIAM H. GORHAM,
Proctor for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—SS.

W. R. CHESLEY, being first duly sworn, on oath deposes and says: That he is the President of Libellant corporation within named; that he has read the foregoing answers, knows the contents thereof and believes the same to be true.

W. R. CHESLEY.

Subscribed and sworn to before me this 28th day of June, 1927.

(Seal) Notary Public in and for the State
 of Washington, residing at Seattle.

WILLIAM H. GORHAM,

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

December 14, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.

No. 5539.

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD.,

Respondent.

FURTHER ANSWER OF LIBELLANT TO INTERROGATORIES PROPOUNDED
BY RESPONDENT.

Comes now the Chesley Tug & Barge Company, above named Libellant, and further answering subdivision C of the seventh interrogatory propounded by respondent, says:

That said railway cars and said crane and idler car were further fastened or secured to said barge as follows:

Said locomotive crane on its own wheels, coupled to said idler car, was placed on the center track of said car barge and against said 7x9 or 8x8 timbers, said idler car being forward of the crane; and the brakes of all said railway cars and said idler car, as spotted on said car barge, were set by air and by hand.

CHESLEY TUG & BARGE COMPANY,
Libellant.

WILLIAM H. GORHAM,
Proctor for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—SS.

W. R. CHESLEY, being first duly sworn, on oath deposes and says: That he is President of the Libellant corporation within named; that he has read the further foregoing answer, knows the contents thereof and believes the same to be true.

W. R. CHESLEY.

Subscribed and sworn to before me this 19th
day of December, 1927.

(Seal) WILLIAM H. GORHAM,
Notary Public in and for the State
of Washington, residing at Seattle.

Endorsed.

Filed in the United States District Court, Western
District of Washington, Southern Division.

December 22, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5538.

A. GUTHRIE & COMPANY, INC.,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

No. 5539.

CONSOLIDATED FOR TRIAL.

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COM-
PANY, LTD., a corporation,

Respondent.

BE IT REMEMBERED that heretofore and on to-wit, December 27, 1927, the above entitled causes came regularly on for trial in the above Court, and before the Honorable Edward E. Cushman, Judge of said Court, sitting without a jury;

The Libellants appearing by Mr. William H. Gorham, their proctor;

The Respondent appearing by Mr. Howard G. Cosgrove of Messrs. Cosgrove & Terhune, its proctor;

AND THEREUPON the following proceedings were had and done, to-wit:

THE COURT: Is the case of A. Guthrie & Company consolidated with the case of Chesley Tug & Barge Company?

MR. GORHAM: Yes, if Your Honor please, they are two cases consolidated.

THE COURT: Are the parties ready in both cases?

MR. GORHAM: The parties are ready in both cases, if Your Honor please.

MR. COSGROVE: Yes, sir.

THE COURT: Very well. You may make a statement. The statement you are making is in which case?

MR. GORHAM: The statement will be in both cases, if Your Honor please. Before making a statement I desire to have the record show that counsel consents to amending the amended libel in cause No. 5538, A. Guthrie & Company against the Standard Marine Insurance Company to this effect:

First: That for all purposes touching questions of law and of fact in the above entitled cause—that is the Guthrie cause—the certificate of insurance and the regular F. P. A. English form of cargo

policy, copies of which are referred to in and attached to the amended libel in said cause as Exhibits "A" and "B" respectively, constitute the entire contract of marine insurance alleged in said amended libel; and that, notwithstanding the express reference in said certificate of insurance to an open policy, there never was any open policy issued or intended to be issued touching the insurance effected by said contract of marine insurance.

Second: That said amended libel may be deemed as amended in accordance with the first paragraph of this stipulation.

Third: That no reformation of said contract shall be required or deemed necessary in said cause.

That was a stipulation, if the Court please, entered into in the Chesley case because Your Honor had exceptions to the second amended libel in the Chesley case under advisement and determined those exceptions, but that stipulation was not put into the Guthrie case and we are now putting it in.

(Discussion.)

THE COURT: Where will the Court find this amendment; is it a stipulation?

MR. GORHAM: The amendment is a stipulation entered in the Chesley case, a written stipulation, dated November 26, 1926. The amendment that I have just read is by written stipulation of November 26, 1926, in the Chesley case, and we are

now inserting the same stipulation and amendment in the Guthrie case. Counsel for the Respondent has a further statement to make.

MR. COSGROVE: There is a stipulation in each of these cases, if the Court please, reading as follows:

“That this cause may be, for the purposes of trial, consolidated with cause No.”—that is the number of the other cause—“in this Court, in admiralty”—Now I read from the Chesley stipulation—“wherein A. Guthrie and Co., Inc., is libellant, and Standard Marine Insurance Company, Ltd., a corporation, is respondent.

That Article III of respondent’s separate and affirmative defense (set forth in its answer to libellant’s second amended libel) may be amended by interlineation, adding after the word ‘that’ in the seventh line of said article the words ‘their brakes were not set and ,’.”

THE COURT: What are you reading from?

MR. COSGROVE: A stipulation.

THE COURT: What stipulation is that?

MR. COSGROVE: That is a stipulation of September 15th, I believe.

MR. GORHAM: September 19th.

MR. COSGROVE: 19th.

MR. GORHAM: 1926.

MR. COSGROVE: 1927.

THE COURT: In which case.

MR. GORHAM: That is in the Chesley case, a written stipulation. I do not think that was filed in the other cases at all. No.

MR. COSGROVE: Yes, it was.

MR. GORHAM: Was it?

MR. COSGROVE: There is the same stipulation in the other case, if the Court please. We would like to have the answers amended according to the stipulation.

MR. GORHAM: We further ask, if the Court please—

THE COURT: You are asking that that be inserted as an amendment without filing a new pleading?

MR. GORHAM: Yes, that is satisfactory, if the Court please. We also ask at this time an order publishing the deposition of B. B. Whitney, heretofore taken and filed in these causes, or in one of them, in the office of the clerk, and also a statement in the nature of a deposition by Mr. Summers, the weather bureau man at Seattle, heretofore taken and filed with the clerk of this Court.

THE COURT: Any objection?

MR. COSGROVE: No.

THE COURT: It is so ordered.

MR. GORHAM: Now, if the Court please—

MR. COSGROVE: I think we ought to in-

roduce this stipulation of consolidation or statement of consolidation.

MR. GORHAM: Well, we did.

MR. COSGROVE: No.

MR. GORHAM: No. All right. Yes; that is the stipulation of September 29th, 1927.

THE COURT: A while ago I understood you to say September 19th. Is that another stipulation?

MR. GORHAM: No. It is September 19, 1927. That is the stipulation with reference to consolidation and with reference to the amendment of respondent's separate and affirmative defense. That is 1927. The other stipulation is November 26, 1926, amending the libels in each case.

THE COURT: Then what were you saying regarding a stipulation of September 29th?

MR. GORHAM: There is not any of September 29th, if the Court please.

(Proctors for the respective parties made opening statements.)

MR. GORHAM: Mr. Clark, will you give me the Wrenn deposition. If Your Honor please, we will put in formal proof in the first case, the Guthrie case, and then we will put in formal proof in the Chesley case, and then we will put in proof with reference to the perils of the sea, which will apply to both cases. That will be the order of the proof, if that is satisfactory to the Court.

THE COURT: What time of year was this?

MR. GORHAM: I think it was in February, if the Court please, February 3rd, on the morning of February 3, 1926.

THE CLERK: What deposition did you want?

MR. GORHAM: The Wrenn.

THE CLERK: I will have to go to the office and get it.

MR. GORHAM: I think Mr. Cosgrove will let me read the copy which I have.

MR. COSGROVE: Yes. Go ahead.

MR. GORHAM: This deposition has heretofore been published by an order of the Court. Deposition of V. C. Wrenn, taken in Portland, Oregon, on the 26th day of November, 1927, on notice, and both parties being present.

(Proctors for the respective parties read the said deposition, and proceedings were had thereon, as follows:)

V. C. WRENN, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your residence, Mr. Wrenn?

A. Oak Grove.

Q. Multnomah County, Oregon?

(Testimony of V. C. Wrenn.)

A. Clackamas County, Oregon.

Q. You reside there permanently?

A. Yes, sir.

Q. And outside the District of Washington more than one hundred miles from the place of the trial of this cause at Tacoma?

A. Yes, sir.

Q. What is your occupation, Mr. Wrenn?

A. I am purchasing agent and office manager for A. Guthrie & Company.

Q. They are the libelants in this cause?

A. Yes, sir.

Q. How long have you been such purchasing agent?

A. Purchasing agent since nineteen thirteen, office manager since seventeen.

Q. What is their business?

A. Contractors and engineers.

Q. What scope of contracts?

A. General contracting, engineering work in particular.

Q. Now engaged in driving a tunnel in the Cascade Mountains for the Great Northern Railroad?

A. Yes, sir.

Q. What have been and are your duties as purchasing agent?

(Testimony of V. C. Wrenn.)

A. I buy practically everything that we use in the operations out of the Portland office, and direct other purchases that are made.

Q. How about the disposition of equipment that you have acquired,—that come through your office?

A. That passes through my hands also.

Q. Are you familiar with the Cushman power project in the Olympic Mountains, state of Washington?

A. Yes, sir.

Q. Did your company have anything to do with that project?

A. We had the contract for the building of the dam and the power house building.

Q. Did you use any of your equipment in that work under your contract?

A. Yes.

Q. What was the character of the equipment, generally speaking?

A. The equipment we used in excavation and concrete work.

Q. What was the volume of that work?

A. In dollars, you mean?

Q. No, no; so far as the magnitude of the contract or otherwise was concerned?

A. A hundred thousand yards of concrete,

(Testimony of V. C. Wrenn.)

forty or fifty thousand yards of excavation,—I don't recall just offhand.

Q. And how much concrete?

A. A hundred thousand yards.

Q. Did you have your equipment on that work in the month of January, 1926?

A. We started moving off in January.

Q. And do you remember of that equipment being moved from Potlatch towards Seattle about the first of February?

A. Yes, sir.

Q. You ordered the insurance to be placed upon that equipment?

A. Yes.

Q. You do that personally?

A. Yes.

Q. Through whom?

A. Mr. Chesley.

Q. Chesley of the Chesley Tug & Barge Company?

A. Yes.

Q. That is the policy that is involved in this litigation, this lawsuit?

A. Yes.

Q. Was that equipment which you moved from there on or about the first or second of February

(Testimony of V. C. Wrenn.)

owned by the,—state who was the owner of that equipment.

A. A. Guthrie & Company was the owner.

Q. How long had they been the owner, approximately?

A. Some of it for sometime, and some was new when we went on the job up there.

Q. Had they been the owner for thirty days or more?

A. Oh, yes; none was under six months old.

Q. And as it was moved from the work and on to the barge for shipment to Seattle, it still remained in the ownership of your company?

A. Yes; with one exception,—there was a geared, pump listed here for six hundred and fifty dollars. We paid for it immediately after the scow was lost.

MR. GORHAM: Please mark this 'Wrenn's Deposition identification 1' (Handing paper to reporter).

Said paper was so marked 'Wrenn's Deposition, Identification 1'.

Q. I show you a paper marked 'Wrenn's Deposition Identification 1', and ask you what that is.

A. This top paper?

Q. All of it, all together.

A. List of contents of four cars of equipment.

(Testimony of V. C. Wrenn.)

with the exception of this first car on here, and that is only part of the list.

Q. Equipment of what four cars?

A. Four cars of equipment that were shipped on Chesley's barge on February first or February second, I am not sure which.

Q. And covered by the policy of insurance in question?

A. Covered by the insurance policy in question.

Q. Was that list made in your office?

A. This list was made in my office, yes.

Q. Is that, so far as you know, a true list of the equipment owned by your company and shipped on that barge at that time and covered by the policy?

A. Yes.

Q. With the exception of that—?

A. With the exception of that motor which was not ours at the time of the loss and with the exception of that one car there which was not complete.

Q. You mean on the first page?

A. The first car, Great Northern 62437.

Q. What additional equipment was in that car?

A. Do you want me to read off the list?

Q. No. There was additional equipment?

(Testimony of V. C. Wrenn.)

A. Yes.

Q. What did it consist of?

A. Four dump cars, sixty-seven three-foot sections of drop chutes—

MR. COSGROVE: (Interrupting) This is additional equipment to what?

MR. GORHAM: To this list, that is all.

A. (Continuing) Five concrete carts, one number 8850 Lakewood round hopper, one number twelve Smith tilting mixer, number 10163 with batch discharge hopper, one three-quarter yard Hayward orange peel bucket.

Q. What was the approximate value on February first of the equipment the description of which you have just testified to?

MR. COSGROVE: Objected to as incompetent, irrelevant and immaterial.

MR. GORHAM: You may answer the question.

A. Six hundred dollars.

Q. I will ask you,—the first page of Identification 1 refers to G. N. car 62437; the insurance policy calls for G. N. 62487; is that a clerical error in one place or the other?

A. Clerical error in one place or the other,—same car.

Q. Look at Identification 1, second page. I will ask you, after deducting the value of the geared

(Testimony of V. C. Wrenn.)

motor, or that pump, what would be the approximate value of the equipment of the car, exclusive of that one pump?

A. Four thousand eight hundred and forty-four dollars.

Q. Referring now again to the contents of car 62437, which is partly described on page 1 of Identification 1, I will ask you if the list of additional equipment in car 62437 other than shown on page one of Identification 1, and to which you have testified, was or was not owned by A. Guthrie & Company on February first or second, 1926?

A. Additional equipment was owned by A. Guthrie & Company?

Q. Yes.

A. Yes.

Q. From what record was Identification number 1 made up?

A. Made up from the shipping list as sent in by the field boss.

Q. At the works where this contract was being performed?

A. Yes, where the cars were loaded.

Q. You have that in your possession now?

A. I have it in my hand, yes, sir.

Q. That was mailed to the general office of A. Guthrie & Company, Portland?

(Testimony of V. C. Wrenn.)

A. Yes.

Q. At or about that time?

A. Yes, sir.

Q. Who makes that list up?

A. This list was made up by C. M. Faulkner who was the field accountant.

Q. Of what company?

A. A. Guthrie & Company.

Q. And what were his duties?

A. General cost accounting and looking after disposition of material on the job,—that is, checking it in and out.

MR. GORHAM: We offer Identification 1 in evidence, and we ask to have these papers marked 'Wrenn's Deposition, Identification 2', consisting of sixteen pages.

Said paper marked 'Wrenn's Deposition, Identification 1' was received in evidence and is hereto attached, and said paper consisting of sixteen pages was marked 'Wrenn's Deposition, Identification 2'.

Q. This Identification number 2 is that which you have just identified as returned to you by the field accountant?

A. Yes.

Q. When you are speaking of A. Guthrie & Company, you are referring to A. Guthrie & Co., Incorporated,—that is the technical name?

A. Yes.

(Testimony of V. C. Wrenn.)

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Libellant in referring to these cars refers to Great Northern numbers 60054, 62487, 61114 and 60152, four Great Northern cars?

A. Yes, that is with the exception of this car here 62487,—it is either 487 or 437; there is a clerical error there some place in that car.

Q. From the testimony you have given I judge that on Great Northern 60152 you claim there was certain equipment on board this car in addition to that set forth in your exhibit,—the additional equipment you state was valued at \$650?

A. Yes.

Q. That was not the Libellant's property?

A. No, not at that time, although we paid for it immediately after the loss.

Q. And then did I understand you to say that there was other equipment on board this car, still other equipment not listed in your number 1?

MR. GORHAM: Not on that car but on 62347.

MR. COSGROVE: Car 62437 or 87, as it may be, there was equipment aggregating in value twelve hundred dollars in addition to that listed?

MR. GORHAM: Inclusive of that; this is number 1.

Q. Where were these four-yard Western dump cars?

(Testimony of V. C. Wrenn.)

A. They were on another car.

Q. 61114?

A. Yes, sir.

Q. Well, this testimony that you have given is for the purpose of showing that there was on board these cars the property of Libellant of the value equal to that of the policy?

MR. GORHAM: Otherwise, by Identification, —by exhibit number 1 we show in the one car a value of equipment less than was insured, and we are supplying a list of additional equipment in that particular car which brings it up to and beyond the value insured.

Q. Well, I will ask you another question: Was all the property in these particular cars mentioned as of February 2, 1926, the property of A. Guthrie & Company with the exception of this pump?

A. This pump and motor.

Q. And was it all of the approximate value of the amounts stated in the policy of insurance?

A. In excess of the amount stated in the policy of insurance.

Q. You didn't see these cars that you refer to loaded on this Chesley barge, did you?

MR. GORHAM: We will tie that up later.

MR. COSGROVE: What he said about it being loaded on the cars I would object to as hearsay.

(Testimony of V. C. Wrem.)

MR. GORHAM: We will tie that up. We are simply showing by this witness who was the owner of the material on those cars, and we will prove what went into the cars with other witnesses. (To witness.) You were the bailee of that, and were using it in your contract work?

THE WITNESS: We had rented it and had been using it.

THE COURT: What is he referring to; that additional equipment?

MR. GORHAM: That pump.

MR. COSGROVE: I assume it was the pump. (Continuing reading.)

MR. GORHAM: We offer in evidence 'Wrem's Deposition Identification 2'.

Said papers were received in evidence and are hereto attached.

MR. COSGROVE: I take it that this testimony is not only to show the ownership of the material that was put into these particular cars, but it was in them on February second?

MR. GORHAM: Yes, and that the value was far in excess of the cash value as he has testified in cross examination in response to your questions. There is no question of value between us.

MR. COSGROVE: No.

(Testimony of V. C. Wrenn.)

MR. GORHAM: It is stipulated that the parties waive the reading of the transcript of these stenographic notes by the witness, and waive the witness' signature to the deposition.

MR. COSGROVE: All right."

MR. GORHAM: We offer in evidence the deposition, if it is necessary. We offer in evidence the exhibits attached to the deposition.

THE COURT: Admitted.

THE CLERK: There is a notice and order to publish, but our record does not show that there was any deposition of Mr. Wrenn ever filed.

MR. GORHAM: We have got a copy. Will you admit this is a copy.

MR. COSGROVE: Except I would like to have those exhibits.

MR. GORHAM: Why, yes.

MR. COSGROVE: This without the exhibits is not of value to anybody and I never had a copy of the exhibits.

MR. GORHAM: This is a surprise to me, if the Court please. I can telegraph to the Commissioner at noon asking what he did with that. He may have sent it to Seattle. He knew we were from Seattle and he may have sent it to Seattle. If it is there we can get it.

THE COURT: What are the exhibits?

MR. GORHAM: No. "1" is a typewritten list of this equipment and No. "2" is a list of equipment in the handwriting of the people on the job that was sent to Mr. Wrenn. We have a witness present who was in charge of the job on Lake Cushman, who will identify that list and show that that material went in. The only issue in the pleadings is whether we were owner or not; that is the only issue. They admit everything else but the fact that we were the owner of this equipment.

MR. COSGROVE: Through this deposition I did not admit that this material was loaded into these cars.

MR. GORHAM: Not in the deposition, but you have admitted it in your pleadings. We call Mr. Faulkner. It never occurred to me, if the Court please, having gotten the copy, to inquire whether it was filed. I presumed that it was. And we ask leave to file those exhibits when we ascertain where they are.

C. M. FAULKNER, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. That your full name.

(Testimony of C. M. Faulkner.)

A. C. M. Faulkner.

Q. What is your business, Mr. Faulkner?

A. I am employed by A. Guthrie & Company as clerk and accountant.

Q. Have you a profession?

A. Yes, sir.

Q. What is your profession?

A. Civil engineering.

Q. Are you a graduate of an accredited college?

A. Yes, sir.

Q. How long have you been a civil engineer?

A. Since I graduated in 1906.

Q. And what were your duties as accountant for Guthrie & Company?

A. Well, I had charge of their field office, including the accounting and keeping of pay rolls and disposition of material, all the duties that come within a field office.

Q. That is A. Guthrie & Company, Inc., of Portland, the Libellant in this cause?

A. Yes, sir.

Q. You were at the scene of the construction of the Cushman project—

A. I was.

Q. —in this state, in the interest of Guthrie & Company?

(Testimony of C. M. Faulkner.)

A. Yes, sir.

Q. When did you cease working there; when did Guthrie & Company cease working there approximately?

A. Well, we left there on the 6th of February, 1926.

Q. When did you ship your material out?

A. We shipped—made several shipments beginning in January I think the—I could not give you the exact dates.

Q. Guthrie & Company had their camp equipment there?

A. Yes, sir.

Q. Do you remember of any shipment being made on or about February 1st?

A. Yes, sir.

Q. The last shipment I am referring to now, the last that you sent out.

A. It was about that date. I could not give you the exact—

Q. How many car loads were there?

A. Four.

Q. Did you check that exact stuff?

A. Yes, sir.

Q. And made a list and sent it to Portland?

A. Yes, sir.

(Testimony of C. M. Faulkner.)

Q. That is the list Mr. Wrenn referred to in his deposition as having received?

A. I presume so unquestionably.

Q. You know of that motor pump?

A. Yes, sir.

Q. Now exclusive of the motor pump, do you know what the reasonable value—

MR. GORHAM: Well, I guess the value is admitted \$6100. You have admitted the value of the shipment on those four cars.

Q. Would or would not the value of the equipment on those four cars exceed \$6100?

A. Well, I would say they would, but I would have to take those items and place a value on each separate item before I could make—

MR. COSGROVE: I think you are limited, Mr. Gorham, to the valuation of each car set forth in the policy rather than to a total valuation.

MR. GORHAM: Well, you have admitted the total value there.

MR. COSGROVE: If the value has anything to do with it at all it is a per car valuation as set forth in the policy.

MR. GORHAM: I am handicapped by the fact that that list is not here.

THE CLERK: I can telephone our Seattle office and see if it is on file there.

(Testimony of C. M. Faulkner.)

MR. GORHAM: I wish you would. In the third paragraph of the amended libel we allege that between the first and third of February, 1926, the Libellant was the owner of certain camp equipment of the aggregate value of \$6100 on board certain railroad freight cars as follows, enumerating the certain cars and initials with the amount and the value of equipment on each car. All of that is admitted. If they admit that the aggregate value is \$6100 I do not think it is necessary for us to particularly give the value in each particular car at this time. They have admitted the aggregate value and they have simply denied the ownership.

Q. That property that you put into those cars at Lake Cushman was the property of A. Guthrie & Company?

A. So far as I know, it was; yes, sir.

MR. GORHAM: I think that is all just at present.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. What property did you put in those cars, Mr. Faulkner?

A. I could not tell you without the original list to identify it.

Q. Where was it going?

(Testimony of C. M. Faulkner.)

A. It was loaded on the cars to go to Potlatch and to go from there of course to Seattle.

Q. To Seattle only; was that the destination?

A. So far as I know, that is the only destination I knew of.

Q. And when were these loaded?

A. Well, I would need the date of this list to tell you exactly, but it was about the first of February.

Q. How many cars were there?

A. Four cars.

Q. Did you load any other four cars at that time?

A. Not at that particular time; no, sir.

Q. Did you do the loading?

A. I didn't do the loading; no, sir. I checked the material onto the cars.

Q. Do you remember what the material consisted of?

A. There would not be any use for me to attempt to give you any list without the original list; I simply could not do it.

Q. Do you remember a donkey engine?

A. I would rather not answer those questions until the list is furnished me because I might make an assertion that would be wrong.

MR. COSGROVE: I would like to cross ex-

amine the witness again upon the production of the list.

THE COURT: It is so understood.

MR. GORHAM: Yes. Of course we will have to recall the witness when we get the list. I have got a copy of that list somewhere, but it is only a typewritten copy. He might refresh his memory as to the articles, but it would not identify the original list at all. We offer in evidence the original certificate of insurance issued by the Respondent to A. Guthrie & Company, February 2, 1926, No. 74396, for \$6100, of the Standard Marine Insurance Company, Ltd.

MR. COSGROVE: No objection.

THE COURT: The Clerk is not here. It will be admitted. You will see that the Clerk marks it.

MR. GORHAM: Yes.

(Document referred to admitted in evidence and marked Libellants' Exhibit "1".)

MR. GORHAM: Now with the exception of producing the deposition containing those original exhibits of Wrenn, Exhibits "1" and "2", and identifying them by this witness, that is our formal case on the Guthrie cause with the exception of the weather and the loss of the cars and contents.

(Witness excused.)

(Testimony of B. R. Nichols.)

B. R. NICHOLS, called as a witness on behalf of the libellants, being first duly sworn, testified as follows:

THE COURT: Your full name?

A. B. R. Nichols; N-i-c-h-o-l-s.

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Will you state your full name?

A. B. R. Nichols.

Q. What is your business, Mr. Nichols?

A. Purchasing agent, City of Tacoma.

Q. How long have you been such purchasing agent?

A. Six months. Previous to that purchasing agent for the Light Department.

Q. How long were you purchasing agent for the Light Department?

A. Oh, I have been in the employ about seventeen years. I would say about ten years.

Q. What were your duties as purchasing agent for the Light Department?

A. Purchasing supplies and taking care of the rental of equipment and so forth.

Q. Do you remember of the City of Tacoma renting from Sussman & Company of this City a certain locomotive crane on its own wheels in 1925?

A. Yes, somewhere in May.

(Testimony of B. R. Nichols.)

Q. Was that a written or oral agreement?

A. An oral agreement.

Q. Were you to pay for the hire of that; were you to pay for the hire?

A. Three hundred and fifty dollars a month.

MR. COSGROVE: Let me ask if he knows who made it. Did he make the contract?

THE WITNESS: A verbal contract between Mr. Sussman and R. Davidson, Commissioner of Light and Water, and myself.

Q. When was the car delivered to the City of Tacoma under that agreement?

A. A few days after it left Tacoma. It left Tacoma about the 25th.

Q. Of May?

A. Of May.

Q. 1925?

A. 1925.

Q. For what term did the City hire that locomotive crane?

A. It was an indefinite term. We didn't know how long we would use it. Three to nine or ten months; maybe longer.

Q. To be redelivered to owner at the convenience of the City?

A. At Tacoma, yes.

Q. At the convenience of the City?

A. At the convenience of the City.

(Testimony of B. R. Nichols.)

Q. As to time?

A. Yes, as to time.

Q. Was that crane necessary in the completion of what is called the Cushman Power Project of the City of Tacoma?

A. It was, for the installation of electric equipment.

Q. That project was carried on under ordinance No. 8036 of the City of Tacoma?

A. I don't remember just the ordinance.

Q. Who ordered the shipment of the crane from Tacoma up to the works?

A. Frank Sussman. I instructed Frank Sussman & Company to ship it.

Q. By what route?

A. By rail to Seattle and the Chesley Tug & Barge to Potlatch.

Q. And from there up into the mountains?

A. Yes.

Q. Who ordered the return of the shipment, if any one?

A. As I recollect, our camp foreman up there called in on the telephone and said it was ready to move and the Chesley Tug & Barge Company was notified.

Q. They were notified to return that shipment from Potlatch to Seattle?

A. Yes, and I think they were instructed, too,

(Testimony of B. R. Nichols.)

to send an idler car over there to take care of the boom, as I recollect it.

MR. COSGROVE: I understand that is the Lake Cushman construction ordinance.

MR. GORHAM: Well, here is "An ordinance," if the please, "authorizing the Commissioner of Light and Water to proceed with the construction of the first installation of hydro electric power unit Number two of the City of Tacoma; providing for the issuance and sale of negotiable bonds of the City of Tacoma in the sum of \$4,000,000.00 to pay the cost thereof; and creating and establishing a special fund for the payment of said bonds and the interest thereon.

MR. COSGROVE: There is no objection.

THE COURT: Ordinance number what?

MR. GORHAM: Number 8036.

Q. And the crane was hired and used by the City of Tacoma in the matter of the construction of the first installation of the hydro electric power unit number two of the City of Tacoma?

A. Yes.

MR. GORHAM: We offer this in evidence.

(Document referred to admitted in evidence and marked Libellants' Exhibit "2".)

MR. GORHAM: He has found the missing documents. That is all.

(Testimony of B. R. Nichols.)

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. The City of Tacoma through your Light Department rented this crane of Mr. Frank Sussman for this particular work up at Lake Cushman?

A. Yes.

Q. That was the only job that the City rented this crane for, was it?

A. Yes.

Q. And in February, 1926, the City's work requiring this crane at Lake Cushman was ended, was it?

A. It was.

THE COURT: When?

MR. COSGROVE: In February, 1926.

THE COURT: Something was said about 1925 a while ago.

MR. GORHAM: It was shipped up there in 1925, if the Court please. He said it was up there six or eight months.

MR. COSGROVE: This was on its return.

Q. At the time the crane was shipped back from Lake Cushman the City was through with it, was it?

A. Yes.

Q. And the shipping back was for its return to the City of Tacoma for redelivery to Sussman?

A. Yes.

MR. COSGROVE: That is all.

MR. GORHAM: I should have asked Mr. Nichols:

FURTHER DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Under the oral agreement to hire this crane where was the City of Tacoma to redeliver this crane to Sussman?

A. The rental was to start at the time, the day it left Sussman's yard and to continue until the day it got back to Sussman's yard on the tide flats.

Q. And the City of Tacoma was to redeliver it to Sussman at Tacoma?

A. Yes.

THE COURT: What is this; did you say Sussman's yard?

THE WITNESS: Yes; he has a yard at Tacoma on the tide flats.

MR. GORHAM: That is all.

(Witness excused.)

RUSSELL C. PETERSON, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Mr. Peterson.

(Testimony of Russell C. Peterson.)

A. Russell C. Peterson.

Q. What is your business?

A. City comptroller, City of Tacoma.

Q. How long have you been the City comptroller?

A. August 1, 1927.

Q. How long have you been connected with the City of Tacoma in any capacity?

A. Since the first of August, 1927.

Q. Is your office the custodian or are you the custodian as City comptroller of the records of the publication by the City of Tacoma under ordinance No. 8829 calling for bids for cash for certain certificates of insurance issued by the Standard Marine Insurance Company to the City of Tacoma on the 2nd day of February, 1926, by the Standard Marine Insurance Company, Ltd., certificate No. 74397?

A. I am.

MR. GORHAM: You have formally denied that. Do you want me to put in formal proof with reference—

MR. COSGROVE: No.

MR. GORHAM: —to the publication of this ordinance and the giving of notice under the ordinance?

MR. COSGROVE: No.

MR. GORHAM: Will you admit that the ordinance No. 8829 was published in the manner re-

(Testimony of Russell C. Peterson.)

quired by law and that the notice therein provided to be given was given as provided by the ordinance? It is merely formal, that is all.

MR. COSGROVE: If you will ask the witness.
(Conference between respective proctors.)

Q. Was this policy of insurance, which is evidenced by certificate of insurance No. 74397, sold by the City of Tacoma at public sale to Chesley Tug & Barge Company?

A. It was.

THE COURT: A while ago you said 74396.

MR. GORHAM: 74397, if the Court please.
That was my error.

Q. Did the Chesley Company put in a bid?

A. They did.

Q. For how much?

A. Seventy-five hundred dollars.

Q. Was that the highest and best bid?

A. Presumably.

Q. Do you know whether it was or not?

A. I don't know. I know that that was the bid that was accepted.

Q. That was the bid that was accepted, a bid for cash?

A. Cash.

Q. And the purchase made by Chesley and the sale by the City of Tacoma of the insurance certificate under that bid?

(Testimony of Russell C. Peterson.)

A. Yes, sir.

Q. Do you know the—

THE COURT: That was the other policy?

MR. GORHAM: This is the Chesley Tug & Barge Company case, if the Court please. The other policy was the Guthrie policy.

THE COURT: 74396?

MR. GORHAM: Yes. They were consecutive numbers.

Q. Is that the signature of the Mayor and the City Clerk? (Showing.)

A. It is.

MR. GORHAM: We offer in evidence, if the Court please, the certified copy of the ordinance 8829 of the City of Tacoma, and we offer in evidence certificate of insurance No. 74397 for \$15,000 by the Standard Marine Insurance Company, Ltd., issued to the Tacoma City Light Department in the sum of \$15,000 on the locomotive crane on its own wheels, including idler car B. & O. 253952, together with the indorsements thereon as follows:

“For value received the City of Tacoma hereby assigns, transfers and sets over unto the Chesley Tug & Barge Company, a Corporation, of Seattle, Washington, all the right, title and interest of the City of Tacoma in and to the within certificate of insurance and of all moneys

(Testimony of Russell C. Peterson.)

due or to become due thereunder. And it is hereby expressly stipulated that the assignee of this certificate of insurance may at its option in its own name or in the name of the City of Tacoma but at its sole and exclusive cost and expense institute and prosecute to final judgment or decree any and all suits and proceedings in any and all courts thereunder against the insurer under said certificate of insurance. This assignment is subject to all the terms and conditions of ordinance No. 8229 of the City of Tacoma, passed June 2, 1926. In witness whereof the City of Tacoma has executed this assignment by its officers thereunto duly authorized this 16th day of June, 1926." Signed "City of Tacoma"—

Q. Who was the Mayor?

A. M. G. Tennant.

MR. GORHAM: (Continuing)—"M. G. Tennant, Mayor. Genevieve Martin, City Clerk. Countersigned this 16th day of June, 1926, Carl G. Cuddy, City Comptroller by P. H. Palmer, Deputy."

Q. That is the signature of the Mayor and the City Clerk upon this endorsement—

A. That is right.

Q. —and the signature of the Deputy City Comptroller—

(Testimony of Russell C. Peterson.)

A. That is right.

Q. —at the time of this assignment?

A. Yes.

MR. GORHAM: We offer that in evidence.

THE COURT: Admitted.

MR. COSGROVE: No objection.

THE CLERK: The ordinance is Exhibit “3” and the certificate of insurance Libellants’ Exhibit “4”.

(Documents referred to admitted in evidence and marked Libellants’ Exhibits “3” and “4”.)

Q. This ordinance was published as required by law?

A. It was.

Q. The notice of the proposed sale as set out and required by the ordinance was published as required by the ordinance?

A. It was.

Q. The records of your office so show—

A. They do.

Q. —by the affidavits of the publisher?

A. They do.

Q. Published in a newspaper?

A. In the newspaper.

MR. GORHAM: That is all.

MR. COSGROVE: I believe your pleadings, Mr. Gorham, allege that this was sold to the highest and best bidder.

MR. GORHAM: Yes.

MR. COSGROVE: There is no examination. He said he didn't know whether that was the highest bid or not. Your pleadings so state, I believe.

BY MR. GORHAM:

Q. Were there any other bids?

A. I was not there at the time, and I don't know as to that. The ordinance states that the certificate could not be sold for less than seventy-five hundred dollars, so therefore I presumed it was the highest and best bid.

Q. It was in fact sold to Mr. Chesley and from that you presume that was the highest and best bid?

A. Yes.

MR. GORHAM: Will you admit it was sold to the highest and best bidder?

MR. COSGROVE: Do you want to say it was the highest and best bid?

MR. GORHAM: It was the highest and best bid to my personal knowledge so far as I know at the time the bid was opened. Is that satisfactory?

MR. COSGROVE: Yes.

(Witness excused.)

W. R. CHESLEY, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

(Testimony of W. R. Chesley.)

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your full name?

A. W. R. Chesley.

Q. Your business?

A. Manager of the Chesley Tug & Barge Company.

Q. And President?

A. President.

Q. How long have you been President of that Company?

A. Since its organization; since 1910 I think.

Q. In the active discharge of your duties all that time?

A. Yes.

Q. And now?

A. Yes.

Q. Was that the Chesley Tug & Barge Company you refer to in this indorsement of certificate of insurance Exhibit "4"?

A. Yes, sir.

Q. You bid in accordance with ordinance No. 8899 of the City of Tacoma and the published notice for that certificate?

A. I did.

Q. You filed a written bid with the City of Tacoma?

A. I think so.

MR. COSGROVE: There is no criticism of the manner or method of bidding or the sale.

Q. You received this certificate of insurance Exhibit "5" under that bid?

A. Yes, sir.

Q. Your Company ever since has been and is now the owner and holder of the certificates of insurance?

A. Yes, sir.

MR. GORHAM: This is Exhibit "4" I mean. That is "4"?

THE CLERK: Yes, sir.

MR. GORHAM: I just said "5" a minute ago. It is "4." That is all.

MR. COSGROVE: That is all.

(Witness excused.)

C. M. FAULKNER, produced as a witness on behalf of the Libellants, being recalled, testified as follows:

DIRECT EXAMINATION.

MR. GORHAM: These papers constitute the original deposition of Mr. Wrenn, if the Court please, that I read to Your Honor with the exception of the exhibits, and I offer the exhibits attached to the deposition of Wrenn as Wrenn's deposition Exhibits "1" and "2," they are referred to.

THE COURT: I have already admitted those.

(Testimony of C. M. Faulkner.)

MR. GORHAM: We did not have them, if the Court please, to offer them.

(Discussion.)

MR. GORHAM: As long as there is no misunderstanding that they have been offered and admitted.

MR. COSGROVE: They went in as your Exhibits "1" and "2" I believe. You have them listed as Exhibits "1" and "2."

THE COURT: That is the way I have them listed simply in my notes.

MR. GORHAM: Then we better change these other numbers, if the Court please.

THE COURT: I think the Clerk really is responsible for the numbering of exhibits. Any memorandum that the Court keeps is simply torn up when the case is over and the clerk's record is the permanent record.

Q. I show you papers marked Exhibit "2" Wrenn's deposition, Exhibit "2" attached to the deposition of V. C. Wrenn, filed in this cause, and ask you what that is—all those papers.

THE COURT: The Clerk's minutes are that Wrenn's Exhibits "1" and "2" were admitted. The Court did not try to give them a number for the purposes of this case.

MR. GORHAM: No. As long as we keep it

(Testimony of C. M. Faulkner.)

straight that is all right. What numbers will you give those, Mr. Clerk?

THE CLERK: I will give them "5" and "6" if they are separate papers.

MR. GORHAM: All right. Yes, they are separate papers, "5" and "6," so we understand it and will not get confused.

THE COURT: The Wrenn deposition Exhibit "1" is marked Exhibit "5" in this case; "2" in the deposition will be marked Exhibit "6" in this case.

(Papers referred to admitted in evidence and marked Libellants' Exhibits "5" and "6.")

A. That is the original list that I made up listing the material loaded on the four cars.

THE COURT: That is number which?

MR. GORHAM: Number "2," if the Court please, Wrenn's "2."

THE CLERK: That will be "6" in this case.

Q. At Lake Cushman?

A. Yes, sir.

Q. The list that you formerly referred to in your testimony in this case?

A. Yes, sir.

Q. Is that a true list of the materials that were checked into those cars by you?

A. To the best of my knowledge and belief, yes, sir.

Q. Have you numbered the cars there?

(Testimony of C. M. Faulkner.)

A. Yes, sir.

Q. Are the numbers of the cars given on the list?

A. Yes, they are.

Q. And the equipment on each paper there went into the car whose number appears on the list itself?

A. Yes, sir.

Q. Several?

A. Yes, sir.

Q. Are these figures in the right hand column your figures?

A. They are not, no, sir.

THE COURT: In the right hand column?

MR. GORHAM: The figures in the right hand column on the Exhibit, if the Court please, are not Mr. Faulkner's figures. We offer that in evidence. It is already in evidence, "6."

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Are these your figures in either right hand column? There are two right hand columns some places. (Showing.)

A. No, neither of those columns are my figures.

THE COURT: When the witness was on the stand a while ago he talked about or mentioned—you questioned him about values. Are you now not

doing so because of any concession you understand to be made regarding values?

MR. GORHAM: We are not attempting to prove any value by this witness, and the figures I referred to in the right hand column and which Mr. Cosgrove referred to in the right hand column are apparently set opposite each item for some purpose which he is not testifying about.

THE COURT: Simply as to ownership?

MR. GORHAM: As to their ownership and as to their being stowed in these cars for transportation to Seattle from Potlatch by the Chesley Tug & Barge Company.

MR. COSGROVE: Then, I understand from you, Mr. Gorham, that all of the figures in this deposition relating apparently to values, the figures in the right hand columns, are not to be considered.

MR. GORHAM: They are not to be considered. We are not attempting to introduce those in evidence by this paper through this witness, and we haven't any other witness.

MR. COSGROVE: With that understanding that no consideration be given to the right hand column figures, we have no objection to the exhibit.

MR. GORHAM: I call Your Honor's attention to the allegations and denials of paragraph three of the libel of Guthrie & Company:

(Testimony of C. M. Faulkner.)

“That between the 1st and 3rd days of February, 1926, both inclusive, libellant was the sole owner of certain used camp equipment of the aggregate reasonable value of sixty-one hundred dollars then and there on board certain railroad freight cars, as follows: Used camp equipment on G. N. car No. 60,054 of the reasonable value of one thousand dollars; used camp equipment on G. N. car No. 62487 of the reasonable value of twelve hundred dollars; used camp equipment on G. N. car No. 61114 of the reasonable value of nine hundred dollars; used camp equipment on G. N. car No. 60152 of the reasonable value of three thousand dollars; all of which said used camp equipment on said cars aforesaid libellant caused to be delivered to and laden aboard car barge known as car barge Chesley No. 1, then lying at Potlatch, Washington, then and there operated by Chesley Tug & Barge Co., a Corporation, as sole owner thereof, in connection with and in tow of the tug Ketchikan II, operated by Libellant as sole owner thereof, for transportation of said barge in tow of said tug from Potlatch to Seattle, Washington, under and according to a tariff schedule,”

and so forth, all of which is admitted except the allegation of ownership, so that we were advised at

(Testimony of C. M. Faulkner.)

the time of that admission that we would not have to prove the values in each particular car because there was no issue taken, and that is why we are not attempting to prove it at this time, nor do we expect to prove it at this trial by any other witness. I want counsel to understand my position.

MR. COSGROVE: Well, I am not changing my position on any particular pleading, Mr. Gorham.

MR. GORHAM: No, but I wanted counsel to understand it, that is all.

CROSS EXAMINATION.

(Continued.)

BY MR. COSGROVE:

Q. Did you see all this material as listed in this Wrenn deposition Exhibits "1" and "2" loaded on these cars?

A. I saw everything that is on that pencil list of my own; yes, sir.

Q. Did you see a fifty horse power economy boiler and an American twelve inch derrick with twelve foot bull wheel?

A. Yes, sir.

Q. Did you see that loaded on?

A. Yes, sir.

Q. And four one and one-half yard Petelar dump cars, sixty-seven three foot sections drop

(Testimony of C. M. Faulkner.)

chutes, five concrete carts, one Lakewood round hopper; did you see all of those go on?

A. I did; yes, sir.

Q. Did they go on flat cars or gondolas?

A. Some of them were flat cars, but I could not say positively that they all were.

Q. Did you superintend the loading?

A. No, I did not superintend the loading; no, sir.

Q. Who did the loading?

A. Part of it was done by this locomotive crane that is in question and part of it was done by hand and I cannot just tell you who was in charge of that.

Q. Is the man present who loaded that?

A. I think the man who operated the crane is, but the fellow who was in charge of Guthrie's forces there I don't think he is. I can tell you who the superintendent was, but I am not positive that he was present when that loading occurred.

Q. Who was in charge of the fastening of the cargo, this equipment, on the cars?

A. Well, if I could tell you that I could tell you who was in charge, because I just don't know who the man was that—

Q. Do you know whether that boiler was shored or fastened on in any manner?

(Testimony of C. M. Faulkner.)

A. No, sir; I don't know anything about the fastenings at all.

MR. COSGROVE: That is all.

MR. GORHAM: That is with reference to the Guthrie case. Now I will ask Mr. Faulkner some questions with reference to the Chesley case.

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. You are familiar with locomotive cranes?

A. Oh, just in a general way. I am no mechanic.

Q. You are no mechanic. You have had to do with such machines in your profession as a civil engineer?

A. More or less; yes, sir.

Q. There was a locomotive crane on the work at Cushman?

A. Yes, sir.

Q. That was brought out at the same time these last four cars of equipment were?

A. It left to go to Potlatch at the same time.

Q. At the same time?

A. Yes, sir.

Q. What was that locomotive crane? Explain to the Court just generally, I mean.

A. Well, a locomotive crane is a crane that travels on a track and has a hoist and a crane that is capable of lifting large weights.

(Testimony of C. M. Faulkner.)

Q. By a boom?

A. By a boom; yes, sir.

Q. What was done with that boom with reference to position at the time it was sent out to Potlatch?

A. It was loaded on an empty flat car which we call an idler.

Q. A gondola car?

A. I don't know whether it was a gondola or flat.

Q. To whom did that crane belong?

A. Well, our impression was that it was a crane that belonged to Mr. Sussman, rented by the City of Tacoma.

Q. How long had it been on the works at the Lake Cushman power plant?

A. Several months. I could not say just exactly.

Q. How much during that time, was it in operation?

A. Well, it was doing something the greater part of the time.

Q. How close, if any time were you to the crane?

A. Oh, I was right by it and upon it.

Q. What was its general condition, if you know?

(Testimony of C. M. Faulkner.)

A. It was in workable condition; that is about all I could say; it was working practically all the time.

Q. Did you know of its failing to work at any time by reason of any defect or lacking in any parts?

A. Not that I know of;

Q. Was it used finally for loading the Guthrie equipment on these cars about the first of February?

A. Yes, we used it then. We used it at various times, loaded out all our heavy equipment with it in fact.

Q. Did you make any particular examination of its boilers or engines or gears?

A. No, sir.

Q. Do you know its age?

A. I do not.

Q. What would be the largest weight that it would lift during the operations at Lake Cushman, if you know; approximately I mean?

A. I could not say. They lifted some large valves and pipe and a lot of stuff. I could not just tell you what the weight in tons was.

MR. GORHAM: That is all, if the Court please.

CROSS EXAMINATION.

BY MR. COSGROVE:

(Testimony of C. M. Faulkner.)

Q. How high was that boiler you just mentioned?

A. The boiler of the locomotive crane?

Q. Yes.

A. How high was it?

Q. Yes.

A. Oh, I could not tell you that. I do not know.

Q. Was it on its own wheels?

A. Yes, sir; the crane was on its own wheels.

Q. No; the donkey boiler?

A. It might have been a donkey boiler.

THE COURT: Are you talking about one thing and the witness talking about another?

MR. COSGROVE: I don't know. We will find out.

Q. I am talking about this boiler I mentioned a while ago.

A. I am talking about the locomotive crane.

Q. Well, let us talk about the boiler.

A. All right.

Q. Was that boiler on its own wheels; was it on wheels?

A. No, sir.

Q. How high was that?

A. Oh, including the smokestack to the top of the smokestack—

(Testimony of C. M. Faulkner.)

Q. To the top of the boiler?

A. To the top of the boiler, oh, I guess that it was seven or eight feet, something like that.

Q. Was that on a platform, a base?

A. Well, it was on a sort of skids, regular skids for a donkey boiler.

Q. And what was this derrick that I just asked you about a moment ago?

A. The derrick, the American derrick?

Q. Yes.

MR. COSGROVE: Where is that list?

Q. (Continuing) With a twelve foot bull—

A. A twelve foot bull wheel?

Q. Bull wheel, yes.

A. Well, that was the iron part of the derrick that we had on our sand and gravel plant.

Q. Was that a perpendicular wheel?

A. No; it was a wheel that was in a horizontal—worked on a horizontal plane.

Q. How high did this American derrick stand above—What was the height of the derrick?

A. Well, I could not say what the height of the derrick was, but the derrick was dismantled when it was loaded on the cars. This was the irons, the derrick irons.

Q. Were there any other high items of this character like the boiler?

(Testimony of C. M. Faulkner.)

A. I would like to look at the list so I can see a little more definitely what was on there please.

(Document handed to the witness.)

A. (Continuing) Well, that No. 12 Smith tilting mixer would probably be six feet high, I would say just offhand.

THE COURT: How long were the skids under the donkey?

THE WITNESS: I could not tell you that just how long they were.

THE COURT: Was it loaded with the skids or did they take it off the skids?

THE WITNESS: Well, my recollection is that it had the skids under it. They are small skids; they are not the big skids like you have under a logging donkey that are three or four feet high, you know. They are small skids. No, there is nothing else there that had any height.

Q. The skids were just for the purpose—

A. Pulling it around from place to place.

Q. Putting the donkey up on the—

A. Well, they use them with the little skids under them. They pull them from place to place with a line on their own power.

Q. What would be the weight of that boiler?

A. I could not tell you that.

(Testimony of C. M. Faulkner.)

Q. And I notice on this second page of Exhibit "2"—

MR. GORHAM: That is Wrenn's "2" you mean?

Q. (Continuing) Wrenn's "2," these particular items: 4 one and a half yard Peteler or Pefeler dump cars.

A. Peteler.

Q. 67 three foot sections drop chutes, 5 concrete carts, 1 No. 8850 Lakewood round hopper, 1 No. 12 Smith tilting mixer, No. 10163 with batch discharge hopper, 1 three quarter yard Hayward orange peel bucket; was that put on one car or more than one car?

A. Let me see the list please.

Q. What is your memory?

A. Well, I would like to look at the list. I made that list up at the time and that is my record.

Q. I was asking you from your memory; not from this list.

A. I don't know from memory.

Q. The list might tell you what the answer was.

A. I cannot remember what went on any of these cars except to look at that list.

MR. GORHAM: I think the witness is entitled to look at the list. It was a memorandum made at the time, if Your Honor please.

(Testimony of C. M. Faulkner.)

A. (Continuing) It was made two years ago and I can't remember it.

THE COURT: It maybe that any answer that he gives would require him to look at the list in order to explain. Just flatly stating that he can't remember without it, if Mr. Cosgrove wants the information and he still persists in his statement that he can't remember about it, why it is up to Mr. Cosgrove to show him the list if he wants the information.

MR. GORHAM: If Mr. Cosgrove wants it?

THE COURT: Yes.

MR. COSGROVE: I am getting along all right. I do not need any help.

THE COURT: If there is any answer that requires explanation or you think requires explanation it is time enough for the Court to rule on the request that he see the list.

MR. GORHAM: He has already testified, if the Court please, that the particular material on each sheet went into the car whose number is designated on that particular sheet; he has already testified to that.

MR. COSGROVE: Well, that is all right. I am going to show it to him. (Handing paper to the witness.)

THE WITNESS: Yes, sir.

(Testimony of C. M. Faulkner.)

Q. I asked you if all those items were in one car?

A. Yes, sir.

Q. Were there any other items in that same car?

A. Yes, sir; the items on page 1 were also on the same car.

Q. How were they stacked up on the car; do you recollect?

A. No, sir; I do not.

Q. Well, did it make a high pile or a full load, or a small load?

A. Yes, it was a full load. It did not impress me as any tremendous load or particularly high; there was nothing about the load that made any particular impression on me any more than any other car.

Q. It filled the car pretty well full?

A. Yes, pretty well full.

Q. And on account of the different shapes of these items did not the contents of the car stand up in the air above the deck of the car considerably?

A. Well, that would depend upon what considerably was. It impressed me as just an ordinary car of contractor's equipment, that would be the impression I got from it.

THE COURT: What do you mean by deck of

the car? The Court can't think of anything to a flatcar but the floor of the car as being the deck, and of course it would be above the floor of the car. What do you mean by the deck?

MR. COSGROVE: It is the floor.

Q. How high above the floor did these contents extend?

A. That would be merely a guess. I didn't measure them, but I would say between six and eight feet no doubt.

Q. You personally checked all these items onto these cars?

A. Yes, sir.

MR. COSGROVE: That is all.

MR. GORHAM: That is all, Mr. Faulkner.

(Witness excused.)

ALBERT E. HARRINGTON, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Mr. Harrington.

A. Albert E. Harrington.

MR. COSGROVE: Pardon me. Is this in the Chesley?

MR. GORHAM: Yes, this is in the Chesley.

Q. What is your age, Mr. Harrington?

(Testimony of Albert E. Harrington.)

A. Forty-four years.

Q. What is your business?

A. An engineer.

Q. What kind of an engineer?

A. A steam operating engineer.

Q. How long have you been a steam engineer?

A. About twenty years.

Q. What character of steam engineer?

A. Principally an operator, shovel man, crane man, and so forth, derrick operator.

Q. Are you engaged in that business now?

A. I am.

Q. Are you familiar with machinery, engines and parts?

A. Yes, sir.

Q. Were you at the Lake Cushman power project of the City of Tacoma at Lake Cushman in 1925 and '26?

A. Yes, sir.

Q. For whom were you working there?

A. The City of Tacoma.

Q. In what capacity?

A. Operator of a locomotive crane.

Q. How many locomotive cranes did they have there?

A. Just the one.

Q. When were you first employed by the City with reference to this particular project?

(Testimony of Albert E. Harrington.)

A. About the first of June, 1925.

Q. And in what capacity were you employed?

A. As an engineer and operator.

Q. And what were to be your duties on the work?

A. To operate this locomotive crane and care for it.

Q. This locomotive crane?

A. Yes, sir.

Q. Did you go up with the crane from Tacoma or did you first take charge of the crane at the works?

A. I first took it at the works. The crane was there when I took it.

Q. What was the condition of the crane at the time you first saw it at the works?

A. It was mechanically in good condition.

Q. How soon after you went there did you commence to operate it?

A. I believe the next day to the best of my recollection.

Q. Were you the chief man in charge of the operation of that crane on that work?

A. The only man in charge of it.

Q. And for how long did you operate that crane after you arrived at Cushman, approximately?

A. About seven months, I believe.

(Testimony of Albert E. Harrington.)

Q. And how continuously did you operate it?

A. Every day except holidays and Sundays; I worked a few Sundays, but nearly every holiday I was off.

THE COURT: You mean by that there were some Sundays you operated?

THE WITNESS: Yes, and some over time at nights.

Q. Explain to the Court just what that locomotive crane on its own wheels was and what its function was; just explain first the machine.

A. Well, the machine itself is a truck with a derrick practically on top of it, one that turns around; it is on an eight wheel truck and it has engines and boilers and gear to turn itself around and operate two fall lines on a locomotive crane and the boom also raises and lowers.

Q. And swings?

A. And swings, turns clear around in any direction. The boom raises and lowers and has two fall lines in addition to the raising and lowering of the booms.

Q. The fall lines run through a rope block and tackle?

A. Over a pulley on the end of the boom to drums; a double drum donkey.

Q. What size wire did it use in its fall?

(Testimony of Albert E. Harrington.)

A. Its fall lines were five eighths.

Q. What was the condition when you first saw it of its boilers?

A. Good.

Q. State whether or not you made any survey of it to ascertain whether it leaked?

A. Yes, sir, I washed the boiler at least seven or eight times while up there and cleaned the flues probably twice or three times.

Q. What?

A. I cleaned the flues nearly every week and the boiler was washed every month or six weeks.

Q. State whether or not you found any leaky condition of the boiler during any of that time?

A. No, the boiler didn't leak at all at any time; no leak in the boiler.

Q. State whether or not the tubes had to be renewed during that time?

A. No, sir; there was no repair on the boiler at all.

Q. State what the condition of the engines was when you first saw it?

A. The engine was in good condition, good mechanical condition.

Q. State whether that condition was maintained throughout the use of it by you at the works up to February, 1926?

(Testimony of Albert E. Harrington.)

A. It was.

Q. State whether or not you had to replace any parts?

A. I believe I replaced one journal on the—that is on the gear, one journal was cutting a little, and I replaced the lines, both the fall and the boom lines, in mid-summer. We didn't break any, but they were old and I replaced them. We had heavy machinery there to handle.

Q. How as to the gear?

A. The gear was good; but little wore at all.

Q. How as to the brakes, the brakes on the gear in the operation of it?

A. On the crane I put one new brake band during the summer on the fall—on the drum that we used on the fall line mostly, renewed that brake lining; not the brake itself, but just the lining. That was in good condition after renewed.

Q. Does the term "locomotive crane" indicate that the machine can move by its own power on a track?

A. Yes, sir.

Q. How many wheels were under this crane?

A. Eight.

Q. Was it ever set on a grade?

A. Sir?

Q. Was it ever set on a grade?

(Testimony of Albert E. Harrington.)

A. It was set on a grade all the time up there.

Q. And what device was used to keep it from moving on the grade?

A. The brake.

Q. The brake on the locomotive crane itself?

A. On the trucks.

Q. How were those brakes set?

A. With steam; steam jammed.

Q. From the boiler on the locomotive crane?

A. Right from the operator's stand there.

Q. On how heavy a grade did you set that crane?

A. I don't know exactly what the grades were there. I would have to find out. We worked on the steepest grade going down to the power house, which I was told was a six per cent grade, but I don't know that it was, but we worked on any grade they had there.

Q. And the brakes would hold?

A. The brakes would hold.

THE COURT: You said six per cent?

THE WITNESS: I was told it was six per cent.

Q. What was the condition of that crane in all respects when it left the works for Potlatch as compared with the condition when you first saw it?

A. It was just as well anyway.

(Testimony of Albert E. Harrington.)

Q. Was it in just as good condition?

A. Just as good condition anyway.

Q. In your opinion did the use that you gave it during that six or eight months impair its condition?

A. No, sir.

Q. Do you know the age of the crane?

A. Not certain, no, I don't. I believe it was stamped on the crane, but I would not be certain.

Q. When the crane came off the works state whether or not it was used in loading the Guthrie camp equipment onto the railroad cars to be dispatched out?

A. All the heavy material was put on with the crane.

Q. When it came out it was attached to the train, hauled by a locomotive of the Phoenix Railroad Company—

A. The Phoenix—

Q. —as a part of the train; was it part of a train composed of other cars when it came out?

A. Yes, sir; they were all coupled together.

Q. What disposition was made of the boom when this crane was set in this train of cars?

A. The boom was lowered over an idler car, a gondola, and the ends taken out of the gondola so that the boom would go down below the sides of the

(Testimony of Albert E. Harrington.)

gondola car within about eighteen inches of the floor, and it was simply used as an idler; the boom did not lay on the idler, but over it; it was lowered within about eighteen inches of the floor of the gondola car.

Q. And how far in the gondola car did the boom extend?

A. Nearly the length of it.

Q. Do you remember the length of that gondola car, approximately?

A. It had to be a special car because the boom was fifty feet long and it would not go into a forty-foot car, I remember that, but just how close it came to the length of this car or the length of this car, I was under the impression it was a fifty-foot car, but I am not certain; it might go into a forty-five, because your boom extends back a little over the truck of your crane and you would have the drawheads, but the exact length of that car I am not certain.

Q. If this locomotive crane was set into this train and the boom swung over this gondola car, what would keep, if anything, the boom from rising and falling vertically?

A. The laws of gravity. That boom is heavy.

Q. Was it locked in any way?

A. No; it hung in its lines and kept it from rising and falling.

(Testimony of Albert E. Harrington.)

Q. What would keep the boom from swinging from side to side?

A. There was turn-buckles put on each corner of the crane and before letting steam down on the crane I took strain on this boom and the part of the crane that extends back over the circle iron there was timber put under, about probably six by eight; anyhow it just would not go under until you took the strain and lifted up the overhang of the crane and layed that timber on there, and the friction would bind and take all of the teeter out of the body of the crane?

Q. But the swinging sideways?

A. That would also tend to hold it from swinging sideways, because there would be considerable friction on it—weight.

Q. Where were the turn-buckles?

A. The turn-buckles were put on each corner.

Q. State whether or not it was possible for that crane to swing one way or the other.

A. It could not swing at all, and the boom was below the sides of the gondola car in such a way that it could not get out anyway without taking the car sides off.

Q. Was the idler car made fast to the locomotive crane?

A. Yes, sir, it was coupled with standard

(Testimony of Albert E. Harrington.)

couplings and chained with railroad chains in case the couplings should come off.

Q. Furnished by the railway with the car?

A. Sent in by the railroad company with the car such as used in case of broken drawheads and such as that.

Q. Do you know of your own knowledge that it was so chained before it started from Potlatch?

A. Yes, sir; I chained it myself.

Q. What was the size of the chains?

A. I could not say positively, but I think three-quarters or seven-eighths; it was heavy chain; it was the regulation chain such as the railroad company used; whether it would be seven-eighths or three-quarters I could not be certain.

Q. What was the size of the couplings?

A. Standard couplings.

Q. And the pin—

THE COURT: What is that?

THE WITNESS: Standard.

Q. That is, you mean standard for that size cars?

A. Standard, yes, standard railroad couplings.

MR. GORHAM: That is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. This chain you speak of, Mr. Harrington,

(Testimony of Albert E. Harrington.)

was a chain for the making of the connection between the gondola and the crane?

A. Yes, sir.

Q. And I didn't understand what you said about these turn-buckles. Tell me again where these turn-buckles were fastened.

A. The turn-buckles were fastened between the corners of the crane body. There is the turret of the crane body, the part that turns around, and the top of the frame of the crane. The frame, the top, is angle iron which projects and clamps. You can just slip a clamp over it and fasten and clamp over the top of the corner of the turret and then tighten these up. These have a thread and nuts on them so you can pull them up so there is no slack, straighten the crane around and put those on and tighten them, then they can't turn around. They are used for shipping shovels, cranes and all that kind of equipment.

Q. It was not a turn-buckle that was fastened to the deck of the barge or any part of the barge, was it?

A. Within the crane itself.

MR. COSGROVE: Will you mark this (handing picture to the clerk)?

MR. GORHAM: That will be Respondent's Exhibit "A-1"?

(Testimony of Albert E. Harrington.)

(Picture referred to marked Respondent's Exhibit "A-1" for identification.)

Q. Would you mind taking a look at Respondent's Exhibit "A-1" and see if that is a faithful or fair representation of this crane that you have been talking about?

A. It looks very similar.

MR. GORHAM: What did he say?

MR. COSGROVE: He said it is very similar. I took it out of a catalogue just for illustrative purposes, just for the purpose of examining the witness. I offer this evidence (handing picture to Mr. Gorham).

MR. GORHAM: Did this crane at Lake Cushman have a housing around it?

THE WITNESS: Yes, sir.

MR. GORHAM: Not shown by this picture?

THE WITNESS: The house is not on that picture. I said very similar. This picture is open and the crane at Lake Cushman was closed in.

MR. GORHAM: We have no objection.

THE COURT: It will be admitted and the hearing will be resumed at 2 o'clock.

(Picture referred to admitted in evidence and marked Respondent's Exhibit "A-1".)

Further proceedings were continued to 2 o'clock P. M., same day.

(Testimony of Albert E. Harrington.)

December 27, 1927, 2 o'clock P. M.

All present;

Proceedings resumed as follows:

ALBERT E. HARRINGTON, a witness on behalf of Libellants, resumed the stand.

CROSS EXAMINATION (Resumed).

BY MR. COSGROVE:

Q. Did you prepare this crane for transportation from Lake Cushman down to Potlatch?

A. I did.

Q. Did you go with it down to Potlatch?

A. I did. not.

Q. Referring now to Respondent's Exhibit "A-1", which, as I understand you to say, is a representation of this crane with the exception of the housing—

A. Very similar outside of the housing.

Q. —the crane that you had having a housing and this having only a partial housing—

A. That is the main difference.

Q. —you said, I believe, that you fastened the boom to the deck of the crane by means of some chains or bolts.

A. I fastened the crane so it would not turn around by means of turn-buckles to the frame.

Q. Would you take the picture and take this red pencil and mark on that the place where one

(Testimony of Albert E. Harrington.)

turn-buckle was fastened and then mark the place where the other end was fastened?

A. The turn-buckle, one end of the turn-buckle was fast to, I believe there is a hand hold right in the end here—

MR. GORHAM: Mark an "X" there.

A (Continuing)—right in there in the frame and a clamp that comes to this frame for the other end.

Q. Suppose I make an "X", is that the point of the fastening of one turn-buckle?

A. Yes, sir, the one end of one turn-buckle.

Q. One end of it. Now let us mark an "O" for the fastening of the other end of the turn-buckle.

A. Right on the flange that I put the "O" around. You see this flange sticks out somewheres two and a half or three inches, a steel flange.

Q. That flange is the upper part of the deck?

A. That is a channel; you see that is about an eighteen inch channel there with a flange out on both the top and the bottom. You can see by the picture.

Q. Now what was the size of your turn-buckle?

A. I am not absolutely certain, but I think the threads on the turn-buckle were an inch and an

(Testimony of Albert E. Harrington.)

eighth. That is only from my memory, you see; I could not be certain.

Q. Was that the full diameter of the connection?

A. That is the tie, yes. It is threaded. I think it is an inch and an eighth. And the pieces were heavier where you hook on at the end, the hooks were heavier than that, but the threads were an inch and an eighth. That is just from memory; I would not be certain.

Q. Is that the diameter of the bolt—

A. It is threaded.

Q. —which ran all the way from one point of fastening to the other?

A. No; that would be—

Q. What was your smallest diameter?

A. That is it; that is the threaded part of the turn-buckle would be your smallest part.

Q. And you had one on each side?

A. I had two on each side. There was one on the front of the crane and one on the back. You have marked the one and opposite that across from the boom would be another and then another on each end of the back; there was four turn-buckles on.

Q. Were those on the opposite end of the crane fastened to the edge of the decking as in front?

A. I believe they were; I believe they were fastened right to the corner of your decking right here

(Testimony of Albert E. Harrington.)

and to this corner here. This iron is a little different arrangement than there was on the one I had up there. You see this channel that runs through, I don't think that decking came down below that. That channel was omitted and the turn-buckle fastened into the main channel and to this on the deck end. That piece of iron extends down further I am certain, than it did on the crane that was at Cushman.

Q. Did the boom rest on anything in the gondola car?

A. No, sir. It was about eighteen inches from the bottom or the deck of the car.

Q. Do you know what the weight of that boom is or was?

A. I do not.

Q. The brake for holding that crane was a brake which was operated by steam?

A. Yes, sir.

Q. It did not have any other brakes on the car—on the crane?

A. There was a small hand brake on the car—a ratchet hand brake on the trucks.

Q. There was a hand brake?

A. Yes, sir.

Q. Was there any other brake?

A. On the trucks; no, sir.

(Testimony of Albert E. Harrington.)

Q. Was it possible to put the crane in gear, gearing the wheels so that it could not move?

A. It was possible, but improbable. The gear was taken out and loaded inside the cab for shipment. In order to ship in a train, you see those cranes only run about six or seven miles an hour and you take out the gear underneath that gears the engine to the wheels, it slips right off the shaft.

Q. That is held on by a pin, isn't it?

A. Yes, sir.

Q. Take the pin out and slip it off?

A. Take it out and put it up in the cab for shipment.

Q. It could have been just as easily put back on, couldn't it?

A. It could have been.

Q. And when that crane arrived on the barge that gear that was put in the housing could have been taken out and slipped on again, could it not?

MR. GORHAM: Just a minute. We object, if the Court please, as not proper cross examination.

THE COURT: Objection overruled.

MR. GORHAM: That is the Respondent's case, if the Court please.

THE COURT: Objection overruled.

MR. GORHAM: We take an exception.

THE COURT: Allowed.

(Testimony of Albert E. Harrington.)

A. The wheel could have been put back on. It is not a very big job. It would take some time.

Q. It could have all been done with a hammer, could it not?

A. I think not. There is a key and a clamp goes outside the key to prevent the key from coming out and those clamps would have to be put back.

Q. If that crane has been put in gear would the crane have been effectually locked—

MR. GORHAM: Just a minute. The same objection, if the Court please.

Q. —or braked?

THE COURT: As I understand it, the gear would have to be put in before it was put in gear. I sustain the objection.

Q. Was there anything in the gondola car?

A. The block.

Q. Beg pardon—

A. The block. There is a single block that the line runs over, your fall line, past the end of your boom down around your block. That block was in the gondola car.

THE COURT: Read that answer.

(Answer read.)

THE COURT: Was it hanging down or what?

THE WITNESS: No; it was taken off and laid in the gondola car free.

(Testimony of Albert E. Harrington.)

Q. Do you know the weight of this crane?

A. I do not.

Q. What is the height of the crane from the top of the smokestack to the top of the deck?

A. I don't know exactly.

Q. I mean the crane's neck.

A. I don't know exactly.

Q. Well, approximately.

A. Between seven and eight feet.

Q. Are the wheels of this crane the standard railroad wheels?

A. I believe they are.

Q. On top of this crane deck and lying parallel with it appears a notched wheel?

A. Yes, sir.

Q. What do you call that wheel?

A. That is your swinging gear—

MR. GORHAM: What do you call it?

A. —what turns you around. Swinging gear what turns the crane around. You have a small pinion coming right down from the engine inside here that runs in these gears, meshes around and turns her, runs the crane around.

Q. That runs around on what, a pinion or—

A. A pinion runs around it. This part of the gear is stationary and the pinion is fast to the swinging part of your crane and as you turn the pinion

(Testimony of Albert E. Harrington.)

with the engine it turns the top of your crane right around, it causes you to swing around.

Q. Take all of this crane above the swinging gear or that large notched gear that lies on the crane deck, take all of that superstructure and what does it revolve around, a king-pin?

A. A king-pin in the center, right in the center, comes right straight through to your driving gears that you see below.

Q. Between the two trucks?

A. Yes, it is right down through there.

Q. I think you said that you used some sticks or timbers to steady some part of that crane. Where did you have them?

A. Put them right across your truck under the boiler and the swinging part, right across the truck this way. I think it was a six by eight. Anyhow it was just a little more than you can poke in here. By taking a little strain on your boom you would cause this to raise up enough so you could fit it in; you have a tight fit so you have got no rock in your crane.

Q. Let me ask that question again so as to get this straight. On the end of the crane opposite the boom, as I understand you, and on top of the crane deck you laid a timber—

A. Yes, sir.

(Testimony of Albert E. Harrington.)

Q. —between the decking and the revolving portion of the crane?

A. Yes, sir.

Q. What kind of timbers were those?

A. It was about a six by eight; I don't know. It was a flat sawed timber and a little shorter than the crane is wide, probably four feet long.

Q. How was that fastened in?

A. Just laid there. The weight of the crane pinched down on it. I laid that in while I still had steam on the crane so that I could raise this portion up whatever slack there is in your pins there; there would be a small amount.

Q. Now coming to the decking or platform of this crane, what is that decking made of?

A. That particular crane—I don't know what is in this one, but on that particular crane it is steel punchings and concrete poured into it from here up to the deck; the depth of this channel was steel punchings and concrete poured on it. That is for weight, for ballast, that is why they fill them.

Q. Where was it you said you put that gear that was removed?

A. About where this man stands up on the platform inside the house.

Q. Referring to the picture now, Exhibit "A-11", you put it up in—

(Testimony of Albert E. Harrington.)

A. On this platform here.

Q. Up where—

A. Where the man stands.

Q. Where the man stands in the picture?

A. Yes.

THE COURT: What?

MR. COSGROVE: He said the gear which came off.

THE WITNESS: The gear which came off. Here is the picture right here on the shaft. You take that gear out for shipment.

MR. GORHAM: That is below the deck?

A. Yes, below the deck. You go down underneath the deck and take that gear off that gears your two sets of wheels together, take that off and put it inside for shipment.

Q. Did you have anything to do with the loading of this crane on the car or barge?

MR. GORHAM: Objected to as not proper cross examination. That is a part of the Respondent's case under its affirmative defenses.

THE COURT: Objection overruled.

MR. GORHAM: We take an exception, if the Court please.

THE COURT: Allowed.

THE WITNESS: Ask your question again, please.

(Testimony of Albert E. Harrington.)

(Question read.)

A. I did not.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Mr. Harrington, you spoke about a hand brake. What was the nature of that hand brake on this crane?

A. Well, the hand brake was a rod going through the frame on the end with a little ratchet wheel and a dog on top so that whatever you pulled up you could lock and the rod on top was square and there was a lever about probably eighteen inches long that you put on there and just tightened that up.

Q. What was the condition of it?

A. The rod that went down through below the clamp was gone off of the bottom of it so that all the strain you had on that rod was the strength of the rod; there was no stay on the bottom; a chain wrapped around that rod, a small chain, and it would hold the crane on a small grade, but it was not a very strong brake.

MR. GORHAM: That is all.

RE-CROSS EXAMINATION.

BY MR. COSGROVE:

Q. It did have some strength, did it?

A. Oh, it would hold the crane on a grade if it were already standing somewhere, just leave it that way.

Q. What do you call a small grade?

A. A two or three per cent grade, a small railroad grade. It would hold it there at the storage tracks anyway. That is the way I used to leave it there all the time.

Q. You say there was a piece missing?

A. Well, yes, in a way. The stay on the bottom of this rod was gone.

Q. Well, the absence of that stay weakened the brake?

A. Some.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

RALPH S. DRURY, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Mr. Drury?

A. Ralph S. Drury.

(Testimony of Ralph S. Drury.)

Q. What is your business?

A. I am resident engineer and sales engineer for the Link-Belt Company.

Q. What is the Link-Belt Company?

A. The Link-Belt Company is a corporation doing business in the manufacturing of conveyor machinery, cranes, hoists, and so forth.

Q. And where is your office?

A. My office is in Seattle.

Q. How long have you had that position with that company?

A. Well, the present position about fifteen years.

Q. Are you familiar with the Link-Belt cranes?

A. Yes, sir.

Q. Referring to Respondent's Exhibit "A-1", is that a fair representation of a Link-Belt crane?

A. It is, sir, yes, sir.

Q. The cranes turned out by your company are numbered?

A. Yes, sir.

Q. Does your company have a price list for those cranes new first hand?

A. Yes, sir.

Q. Can you tell me the list price of Link-Belt crane No. 672?

(Testimony of Ralph S. Drury.)

A. The present price list, do you mean?

Q. No; the list price first hand?

A. On the crane similar to 672 the price list—

MR. COSGROVE: Just a moment.

MR. GORHAM: I am going to put the time in there.

Q. (Continuing), At Seattle in February, 1926?

MR. COSGROVE: Is this a new crane?

MR. GORHAM: Yes, a first hand crane.

MR. COSGROVE: That is objected to as incompetent, irrelevant and immaterial. We are dealing with a second hand crane and if value has anything to do with this matter it is the value of a second hand crane.

THE COURT: I understand that. Objection *overruled*

MR. GORHAM: You may answer the question.

A. The price of a new crane of this type would be \$11,680 at Chicago.

overruled.

MR. COSGROVE: An exception.

THE COURT: Allowed:

Q. What would be the cost of transporting it to Seattle approximately?

A. I will have to refer to a record here. (Witness referring to a card taken from his pocket.)

(Testimony of Ralph S. Drury.)

The freight rate within the last two years, unless it has been changed, is approximately \$1,080.

Q. That would be added to the Chicago price of the crane laid down in Seattle?

A. Yes, sir.

Q. And what, if anything, would have to be added to the crane upon its arrival in Seattle to put it in commission?

A. The crane would have to be ballasted.

THE COURT: What was that amount; ten hundred and what?

A. Approximately \$1,080. The crane would have to be ballasted with, recommended by our company, with steel punchings and then after the steel punchings were added, cemented over the top, grouted rather it is called, with concrete to hold these punchings in place.

THE COURT: P-u-n-c-h-i-n-g-s?

THE WITNESS: Yes, sir.

Q. What would be the approximate cost of that material and labor?

A. Well, the approximate cost would be approximately \$240.

Q. What was the age of this crane I am referring to, 672 I think was the number?

A. The record shows this crane was sold in 1918.

(Testimony of Ralph S. Drury.)

Q. You heard the testimony of Mr. Faulkner and Mr. Harrington in the courtroom this morning—

A. Yes, sir,

Q. —as to the condition of this crane at Lake Cushman?

A. Yes, sir.

Q. From that testimony as to its condition and as to its use during that time can you form an opinion as to the reasonable market value of that crane at Seattle on February 2, 1926, second hand?

A. Well, I would hardly want to say, it depends so much upon the use of the crane absolutely as to what condition it was in; that is, one crane might be used very hard and another one not near so hard, and they would have a different value to a certain extent like any machine, although a crane is a little different from other machines, that is, the market value is not exactly determined all by its use. The value of the crane is perhaps second-hand value—as I say, we are only in the first-hand value cranes; we are not in the second-hand business—the value I would say can only be based upon the life probability of the crane, which might be all the way from we would say fifteen to twenty years; it is pretty hard to say; it depends upon how hard it was used. In selling cranes I might say that

(Testimony of Ralph S. Drury.)

buyers generally depreciate them on from fifteen to twenty years, depending upon their service. I did not see this crane since about two years after it was sold, so I don't know exactly the condition it was in at the time it was supposed to be lost.

Q. Well, from the testimony of Mr. Harrington and Mr. Faulkner as to the condition of the crane on the work, its boilers and engines and gear, could you form any opinion as to the value on February 2, 1926, in Seattle?

A. Well, in talking with owners of various cranes I would say that there is a possibility that the value of this crane would be on a basis of its cost depreciated probably yearly at five per cent.

Q. And if it was eight years—it was 1918 you say it was built?

A. Yes, sir.

Q. 1926 would be eight years?

A. Yes, sir.

Q. That would be forty per cent of its original value?

A. As I say, that is more or less relative, because it depends on the condition it was kept.

Q. If it was kept in good condition and it was in good order and condition at the time, that would be the reasonable market value at Seattle at that time, would it?

(Testimony of Ralph S. Drury.)

A. Yes, sir, it would be somewhere in the neighborhood of that.

Q. Yes, approximately.

A. Approximately.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. As I take your figures your new crane was \$11,680 and the freight was a thousand and eighty and your ballasting was two hundred and forty?

A. Yes, sir.

Q. Making a total of about \$13,100?

MR. GORHAM: What?

MR. COSGROVE: \$13,100.

MR. GORHAM: Yes.

Q. (Continuing) So the depreciation of forty per cent would be approximately \$7,860; is that right?

A. I presume that is the figures. It sounds in round figures about right. I have not figured it out on that basis.

THE COURT: Seven thousand eight hundred and what?

MR. COSGROVE: And sixty dollars.

MR. GORHAM: That would be sixty per cent.

MR. COSGROVE: Yes.

MR. GORHAM: Yes, at sixty per cent.

(Testimony of Ralph S. Drury.)

Q. Mr. Drury, what is the weight of the boom on this crane?

A. Between 6500 and 7000 pounds; that is without any hook block on it; just the boom proper; in the neighborhood of that.

Q. What was the length of this crane on the car?

A. As I remember, the truck length itself approximately twenty-eight feet.

Q. Twenty-seven feet to be exact, wasn't it?

A. It possibly is. I don't remember. Somewhere around twenty-eight feet in round figures.

Q. Could you tell if you looked at the Link-Belt locomotive catalogue?

A. Yes, sir, it is given in the back of the catalogue.

Q. I hand you this document and ask you what it is?

A. That is the sales catalogue of the Link-Belt Company.

MR. COSGROVE: Will you mark it for identification?

(Catalogue marked Respondent's Exhibit "A-2" for identification.)

Q. Will you please refresh your memory from this catalogue and see if you can determine the length of that crane?

(Testimony of Ralph S. Drury.)

A. The length of the crane over all, over the bumpers, or couplers, is twenty-seven feet no inches.

Q. You personally knew this crane, did you?

A. Yes, sir, I have seen it.

MR. COSGROVE: That is all.

(Conference between respective proctors.)

MR. GORHAM: I think we will admit, if the Court please, the figures as to the length of the crane so that the book may not have to go in as an exhibit. We do not want to lumber up the record.

THE COURT: Do I understand the exhibit is withdrawn?

MR. GORHAM: Well, he has not offered it. He simply had it marked for identification. But we will admit what he proved by that exhibit, that the crane was twenty-seven feet and no inches.

MR. COSGROVE: Yes.

MR. GORHAM: That is all I want with Mr. Drury, but I understand the respondent wants him.

MR. COSGROVE: If I may take him out of order and ask him two or three questions, in order that he may go, now as my own witness.

RALPH S. DRURY, called as a witness on behalf of the Respondent, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. COSGROVE:

(Testimony of Ralph S. Drury.)

Q. Mr. Drury, what brakes did this crane have?

A. The way the crane was originally sold, unless it was modified, it had a steam brake on one truck or four wheels.

Q. And when that truck with that crane would be in transportation that steam brake would be out of gear, would it not?

A. Yes, sir.

Q. And you heard the witness preceding you testify as to the removal of that gear at the time this crane was to be put in the train at Lake Cushman to be transported to Potlatch?

A. Yes, sir.

Q. Would there have been any difficulty in putting that gear back in position and putting the crane in gear?

A. No, sir; it would just take a little time.

Q. Well, how long would it take?

A. Well, I never changed one of them, but I should estimate, from my knowledge of machinery, it probably could be done in from thirty to forty-five minutes.

Q. If that had been done would the crane have been effectually braked?

THE COURT: Been what?

MR. COSGROVE: Effectually braked?

A. Well, in answering that I would have to

(Testimony of Ralph S. Drury.)

explain a little the construction of the crane. If the gears were meshed—

THE COURT: In his question he put in “in gear.” Didn’t you?

MR. COSGROVE: Yes.

A. (Continuing) The gears being in mesh, the lower trucks could be locked to some extent through operating the lever in the cab by the operator, but this would not be a complete brake; in other words, the crane might move some with that in gear, but it would depend upon the condition of the frictions which are driven by the steam engine through gearing to the trucks.

Q. Do I understand you that that could not have been locked except through the use of steam?

A. No. That could be locked partially by means of the hand lever by the operator.

Q. That hand lever was in the cab?

A. Yes, sir. But that would not be a complete brake.

Q. Assuming that the thermoid linings were in good order and condition, what value would the brake be?

A. Well, it would hold the crane on a fairly level track. It would not hold it probably on a steep grade, because it might overrun the engine;

(Testimony of Ralph S. Drury.)

but probably on, say, a one or two per cent grade it might hold it.

Q. How would the crane be braked, say, if it was on construction some place and on a grade, how would it be braked effectually?

A. Well, if the crane was in operation it would be braked by means of the steam brake operated from the boiler, but if there was no steam on it could only be braked by means of the hand brake or block on the track.

Q. A steam brake with no steam on is of no use?

A. Absolutely.

Q. And did you say there was a brake, a hand brake?

A. When the crane is shipped from the factory to meet the requirements of the Interstate Commerce Commission it is necessary to put on a hand brake.

Q. Do you know how those cranes and their booms are handled in their shipment on trains?

A. Why, I have seen some of them, yes, sir.

Q. How is the boom handled or stowed, say, on a gondola or idler car attached to—

A. Why, generally the booms are lowered into the car on top of blocking, this blocking being located on the floor of the car.

(Testimony of Ralph S. Drury.)

Q. Did this barge have any hose or air connection—

MR. GORHAM: Barge?

Q. Did this crane have any hose or air connection whereby it could be hooked up with the air lines of other cars, railroad cars?

A. There is a single pipe line running through the lower frame of the crane with hose connections at each end so that when the crane is shipped in train it may be connected through the crane into the next car. That air pipe has no connection to the brakes.

THE COURT: Just let the train's air through?

THE WITNESS: Yes, sir. There is no auxiliary air drum on the crane, which would be necessary to brake it.

Q. In other words, the crane then acts just as a bridge for the air line from the car preceding to the car following?

A. Yes, sir. That is the way it is shipped from the factory. If there was any modification made I don't know.

Q. Do you know how long air is of any force and effect when put on railroad cars, assuming the equipment to be in good order and condition?

MR. GORHAM: I didn't quite get the question.

(Testimony of Ralph S. Drury.)

Q. How long is air good or of effect when put on railroad cars, the equipment in good order and condition?

A. Well, I don't exactly pose as an air brake expert, but in my railroad work I should judge that it might not be effective more than from probably thirty minutes maybe to an hour maybe at the most.

MR. COSGROVE: That is all.

CROSS EXAMINATION.

BY MR. GORHAM:

Q. This gear below the deck of the crane and between the trucks, which you say you take out when the crane is in train, in route, is that usual to take it out in shipment?

A. I didn't catch the last of it. I beg your pardon.

Q. The gear which you say was below the deck and between the trucks of the car that is removed, is it usual to remove that when the locomotive crane is shipped?

A. Well, it is not always usual to take it off, no. It can be ~~shipped~~^{slipped} sideways and the collar on the same shaft. Sometimes they do remove them though.

Q. What is the object of removing them; for protection of the parts?

(Testimony of Ralph S. Drury.)

A. That is about all. It could be tightened up, I suppose, on the shaft again and left there.

Q. Who determines whether it shall be removed or not; the railroad people?

A. No; the crane operator I suppose.

Q. If that gear had been in I understand you to say that the braking on the trucks could not have been locked by hand through the means of that device, that gear?

A. No, not the brakes on the truck.

Q. The brakes on the wheels of the trucks, I mean.

A. No, they could not be exactly locked by hand. The gearing would all be locked integrally through up to the operating lever.

THE COURT: They would drag on the swinging of the crane?

THE WITNESS: Yes, sir; in other words, the weight of the crane would have to overrun the gearing. The operating levers have no connection with the brakes.

Q. Where would be the center of gravity of the crane?

A. Well, that would depend, of course, on whether the crane—how much coal it had in it and how much water was in the tank.

Q. Supposing there was an absence of both coal and water?

(Testimony of Ralph S. Drury.)

A. Well, of course, a person would have to figure that out. The only thing I would say that in standard lifting capacities for rating of the crane it is rated on the basis of the tank half full of water and the coal tank half full of coal. On that basis with the boom practically flat, the center of gravity would be approximately two and a half feet in front of the center swinging pin.

Q. And how high above the deck or below the deck—

A. Well—

Q. —would the boom at rest be horizontally?

A. It would be approximately five feet and a half above the rail.

Q. Above the rail. And how high is the top of the deck of the crane above the rail?

A. It is approximately, as I remember, about four feet and two inches.

Q. So it would be a little above the deck of the crane in a vertical direction?

A. It would be in the neighborhood of sixteen to eighteen inches, yes, sir.

MR. GORHAM: That is five feet what?

THE WITNESS: About five feet six inches.

Q. That was the boom in the gondola car horizontally resting on the dunnage in the car?

A. No, not with the boom resting on the car.

(Testimony of Ralph S. Drury.)

The boom would have to be supported through the upper rotating post in order to give it center of gravity; in other words, you never figure with the boom off because the crane could not do any work.

Q. So you don't know where the center of gravity would be if the boom was resting in the gondola?

A. Not exactly, no, but it would be behind the center pin.

Q. It would be behind the center pin and where would it be in a vertical direction?

A. Well, it would be practically the same height.

Q. As before?

A. Yes, sir.

Q. I understood you to say in preparing these cranes for shipment the boom rests upon timber on the floor of the gondola car.

A. Yes, sir.

MR. GORHAM: That is all, Mr. Drury.

MR. COSGROVE: I would like the privilege of asking another question.

REDIRECT EXAMINATION.

BY MR. COSGROVE:

Q. This drive that you referred to as controllable through a lever in the cab is what you call the thermoid friction drive, isn't it?

(Testimony of Ralph S. Drury.)

A. Yes, sir.

Q. And that is the drive that is used in sending the car or the crane up a steep hill, is it not, or holding it when going down a steep hill?

A. Well, yes, in sending it up it is not exactly used to hold it; it is to drive the crane.

Q. In sending it down it is used, is it not?

A. It consists of two double frictions, one used, going in mesh, to run the crane up hill, for instance if it was on the level or on a hill, and the other friction is used to run it in the opposite direction, whether it is on the level or on a hill.

Q. So that that same friction is used to run the crane up a steep hill and if you put that on the car standing on the level it then affords this same retardation that is the equivalent of the pushing of the car up the hill, is it not?

A. Well, as far as the friction portion of it is concerned, yes; in other words the tendency to slide between the frictions, yes; but without power applied it would not be equal to the push going up the hill quite, because they would have to add power to that.

Q. If the crank pins are wedged is the car well braked?

THE COURT: I didn't understand it.

Q. If the crank pins are wedged is the car well braked?

A. The crank pins of the engine?

Q. Yes.

A. No, sir, I would not consider it was.

THE COURT: You will have to explain that to me before it means anything to me.

MR. COSGROVE: We will dismiss the witness with that. That is all.

(Witness excused.)

BRUNO HERMANN, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. You are the Seattle manager of J. B. F. Davis & Son?

A. Bruno Hermann.

Q. You are Seattle manager of J. B. F. Davis & Son?

A. Marine Department.

Q. Marine department of insurance brokers; they are insurance brokers, aren't they?

A. Insurance brokers and agents.

Q. They are the agents for the Standard Marine Insurance Company, Ltd., Respondent in this case?

A. Yes, sir.

Q. Have you the letter from the Chesley Tug & Barge Company and the invoice accompanying

(Testimony of Bruno Hermann.)

that letter with reference to the loss of the idler car off Chesley No. 1 in tow of Ketchikan II?

A. Yes, sir.

Q. In February, 1926?

A. I don't know whether I showed them to Mr. Cosgrove or not. Mr. Cosgrove, did you see them?

(Papers handed to Mr. Gorham by Mr. Cosgrove.)

Q. Have you been in the court room during the morning?

A. During when?

Q. During the morning have you been in the court room?

A. Yes.

Q. You understand there was a gondola car, an idler car, on this barge?

A. I do.

Q. Now we are referring to that gondola car that was called a B. & O. car No. 253952—that is just to identify it—was that car insured through your office?

MR. COSGROVE: I object, if the Court please, unless counsel is referring to the policy sued upon.

MR. GORHAM: No. I am referring to—what is the name of that company?

MR. COSGROVE: The North British Mercantile.

MR. GORHAM: North British Mercantile Insurance Company.

THE COURT: What is the purpose?

MR. GORHAM: The purpose is to show by this witness that this car was insured by the North British Mercantile Insurance Company at a valuation of \$2500.

THE COURT: Some bearing upon the value of it?

MR. GORHAM: Yes, that is all. And that the depreciated value of the car was appraised as of February 2, 1926, by the Master Car Builders' Association, a standard organization, at \$2504, and that this Mr. Hermann's company, the firm there in Seattle, settled for that loss under that policy for \$2500, the maximum amount under the policy.

THE COURT: Any objection?

MR. COSGROVE: Yes. I object to it as incompetent, irrelevant and immaterial.

MR. GORHAM: May I interrupt you just a moment?

MR. COSGROVE: Yes.

MR. GORHAM: The purpose of this is, if the Court please, because the City of Tacoma inadvertently when it secured the insurance on the crane

added into the description of the insured property the idler car, which they had not any interest in at all and could not recover anything. The gross value of those two pieces under the policy was \$15,000. This particular idler car was insured under the North British Mercantile Company for \$2500 maximum and the Master Car Builders' Association appraised its depreciated value at the time of its loss at \$2504 and they settled for the maximum amount of the policy.

THE COURT: Objection overruled.

MR. COSGROVE: If the Court please, I would like to be heard on my objection there. I do not believe the Court gets the force of what he is trying to do. The suit that is brought here is a suit brought upon a policy which reads \$15,000 as coverage for this gondola or idler car and crane. The Libellant pleads that he made a mistake and included the idler car when it should not have been included and then says in his pleadings that the crane he paid \$7500 for—or the insurance coverage—and that the crane was worth twelve thousand five hundred and that the idler car was worth twenty-five hundred. He now comes in and asks us—he might just as well have gone to Anderson & Company here in Tacoma, if they had had insurance in some other company on the idler car, and asked them, as they ask us, to say

(Testimony of Bruno Hermann.)

what settlement they made upon this idler car with another company, which would have nothing to do with the value of the crane under this policy. Nobody is suing here for the value of an idler car. Nobody is claiming anything for an idler car. They are claiming it for a crane. And the idler car was settled for by another company under another policy with other terms and other conditions, not related in any way whatever to this insurance and is no part of the picture in this case. If counsel has something coming under this policy of insurance for the crane and he wants to prove the value of the crane there are the usual and customary methods of proving the value of that particular article without going out here and trying to prove it by indirection by proving the value of an idler car settled for under another policy by another company some place else. This only leads, if the Court please, to a wholly erroneous result.

THE COURT: It may be anticipating the defense to some extent. I will overrule the objection.

MR. COSGROVE: An exception.

THE COURT: Allowed.

MR. GORHAM: Have you those papers that I called for the other day?

Q. Under the North British Mercantile policy the maximum insurance was \$2500 a car, was it not?

A. The maximum liability.

(Testimony of Bruno Hermann.)

Q. The maximum liability.

A. The maximum liability was not to exceed twenty-five hundred.

Q. And it might be less?

A. Yes.

Q. And the method of determining what was the liability of the company was by the Master Builders—

MR. COSGROVE: I object. The policy speaks for itself.

MR. GORHAM: I am asking him.

THE COURT: Objection overruled.

Q. You determined the actual loss or liability by the survey of the Master Car Builders' Association; wasn't that your standard?

MR. COSGROVE: I renew my objection as not the best evidence. The policy would speak for itself.

THE COURT: Objection overruled.

MR. COSGROVE: An exception.

THE COURT: Allowed.

A. Well, that was the method used.

Q. Yes. And this particular car was appraised by the Master Car Builders' Association at the time of the loss and the appraisal submitted to you at \$2504, was it not?

A. Something like that.

(Testimony of Bruno Hermann.)

Q. Wasn't that the exact amount?

A. Possibly that was.

Q. We want to be exact, Mr. Hermann.

(Paper handed to Mr. Gorham by Mr. Cosgrove.)

(Conference between respective proctors.)

Q. (Continuing) I now hand you a paper which I ask to be marked for identification—

THE CLERK: Libellants' Exhibit "7."

(Paper marked Libellants' Exhibit "7" for identification.)

Q. (Continuing) —Exhibit "7," and ask you if you have seen that before?

A. Yes.

Q. That was taken from your files, was it not?

A. Yes, sir.

And this was the appraisalment of the depreciated valuation of that B. & O. car, gondola, on this barge, lost, on the basis of which you settled for the loss of the car at \$2500, was it not?

MR. COSGROVE: I renew my same objection to this that I made a minute ago.

THE COURT: Objection overruled.

MR. COSGROVE: And the same exception.

THE COURT: Allowed.

A. That is the basis, yes.

Q. That is the basis, and this paper, Exhibit

(Testimony of Bruno Hermann.)

“7,” shows the total value of the car complete on the date of destruction, the depreciated value, \$2504.84, does it not?

A. Yes, sir.

Q. And upon the basis—

THE COURT: What is the answer?

THE WITNESS: Yes, sir.

Q. And upon the basis of this survey and valuation you settled for the loss of that gondola car at the maximum amount of liability under the policy?

A. At \$2500.

Q. \$2500, and that was the maximum amount of the liability on that—

A. On that car.

Q. —on that car on that policy?

A. Yes.

MR. GORHAM: I offer that in evidence, if Your Honor please.

MR. COSGROVE: I move to strike the questions and answers on the grounds mentioned.

THE COURT: The motion is denied.

MR. COSGROVE: An exception.

THE COURT: Allowed.

(Paper referred to admitted in evidence and marked Libellants' Exhibit “7.”)

Q. You insured that crane that is involved in this law suit, Mr. Hermann, through your office, on its voyage from Seattle to Potlatch?

(Testimony of Bruno Hermann.)

A. Seattle to Potlatch?

Q. Yes.

A. I don't recollect.

MR. GORHAM: Mark that for identification.

(Paper marked Libellants' Exhibit "8" for identification.)

Q. I show you paper marked for identification Exhibit "8," and ask if that was issued out of your office, J. B. F. Davis & Son, agents for the Standard Marine Insurance Company?

A. Yes.

Q. Is that on the idler car leaving Seattle for Potlatch in May, 1925—on the crane I mean?

MR. COSGROVE: Get the dates right, Mr. Gorham.

Q. (Continuing) May 25, 1925—May 28, 1925, on the locomotive crane on its own wheels?

A. Yes.

Q. And that crane was insured under this certificate No. 68811, Libellants' Exhibit "8," for \$15,000?

A. Yes.

MR. GORHAM: We offer that in evidence.

(Paper handed to Mr. Cosgrove by Mr. Gorham.)

MR. COSGROVE: I object to this. This is an entirely different insurance policy.

MR. GORHAM: The same crane.

MR. COSGROVE: It has nothing to do with this loss. This is a policy of insurance on a shipment from Seattle to Potlatch. It hasn't anything to do—

THE COURT: It does not cover anything but the crane?

MR. GORHAM: It is on the same crane.

THE COURT: It doesn't cover anything else?

THE WITNESS: I don't think so.

MR. COSGROVE: It covers just the crane.

THE COURT: Objection overruled.

MR. COSGROVE: I will ask an exception to that.

THE COURT: Allowed. Do you claim there is any difference in the principle between what a crane buys and sells for on the market and what it insures for?

MR. COSGROVE: Do I—

THE COURT: I say, do you claim there is any difference in principle between admitting evidence of what a thing buys and sells for on the market and what it is insured for?

MR. COSGROVE: Yes, I do, because no one can tell at all the reasons that go to make up the valuations put in an insurance policy except the people who make these valuations themselves and

(Testimony of Bruno Hermann.)

you cannot tell anything until you bring the policy in itself.

MR. GORHAM: You can tell by the man who wrote it.

MR. COSGROVE: Furthermore, valuations in policies do not have anything to do with the market value whatever. That is a matter of insurance contract. For instance, there is not a schooner going up and down the coast here, not one, that is not valued at from two to three times its market value, not one. It has no relation to market value. And this is in the same situation. You may have a value for insurance which is one, two or three times as high as its market value, and to bring in policies here of this character to prove the value of this crane is to bring in perfectly worthless evidence.

THE COURT: Objection overruled.

(Paper referred to admitted in evidence and marked Libellants' Exhibit "8.")

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Was the seaworthiness admitted in the North British policy that you have been referring to?

A. Yes.

Q. That was admitted as between the insurer and the insured?

A. Yes.

Q. There is no such provision in the policies at suit or either of them?

A. No.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

HUGH G. PURCELL, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your full name, Mr. Purcell?

A. Hugh G. Purcell.

Q. And your business?

A. Manufacturers' representative.

Q. In what line of goods?

A. I handle Industrial and Brownhoist locomotive cranes.

Q. Where is your office?

A. Seattle, Colman Building.

Q. How long have you occupied that position?

A. About five years.

Q. Are you familiar with the Link-Belt crane?

A. Not particularly.

Q. Have you been familiar with the Link-Belt crane at all?

A. As a competitor, yes.

(Testimony of Hugh G. Purcell.)

Q. For two years?

A. For the last three or four years.

Q. In the market at Seattle what is the usual allowance for depreciation on cranes after their sale first hand, on locomotive cranes on their own wheels?

A. Well, that depends largely on the work the crane has been doing, the condition of the crane.

Q. If it has been well cared for so that it is kept in good order and condition both as to its boilers and tubes in the boilers, its engines and gear, what would a reasonable depreciation, year by year, be on the original cost value at Seattle?

A. I don't think there is any definite depreciation value on a crane. I think about twenty-five per cent if the crane was used four or five years would be fair depreciation if kept in good order.

Q. It would be about four or five per cent a year?

A. Something like that.

Q. You were not in the court room this morning?

A. No.

Q. You did not hear Mr. Harrington's testimony as to the condition of this crane?

A. No; no; I just arrived.

Q. You would not be able to tell what the value of this particular crane was on his statement that

(Testimony of Hugh G. Purcell.)

it was in good order and condition; it was built in 1918?

A. As I understand, this was an eight-wheel locomotive crane with a fifty-foot boom, one of the Link-Belt standard twenty ton cranes.

Q. Yes, built in 1918 and for six or eight months beginning June, 1925, up to February, 1926, used out on the Lake Cushman power project and the operator who operated the crane during all of that time testifying that he operated it continuously except Sundays and holidays and sometimes Sundays; that its boilers never leaked the entire time; it was in good order and condition both as to its boilers and tubes, its engines and gear; would you be able from that statement and the age of that crane and from what you know about the Link-Belt crane to make an estimate as to its value in the market on February 2, 1926?

A. We take them in exchange very often and we figure that we can get from seven to eight thousand dollars out of a crane after we take it in and see that it is in good condition. We have one now that is an Ohio, similar to that; we did not manufacture it, but we took it in a trade and we saw it was in good condition and our price on that is seventy-eight hundred.

Q. And that would be the market price for a second-hand crane, would it?

(Testimony of Hugh G. Purcell.)

A. The market varies with the demand; it runs around seven to eight thousand dollars. We sold one the other day of our own of the same general type to Bloedel Donovan for ten thousand dollars delivered at Bellingham, but we guaranteed it for a year. We took it and overhauled it and guaranteed it for a year. We have two similar cranes we are offering now for eight thousand dollars. They are all in good order and good shape and we are offering them at eight thousand dollars. We also have this Ohio, which we are offering for seventy-eight hundred.

Q. How do they compare generally with the Link-Belt crane, better or otherwise?

A. The Link-Belt has a very good reputation, about the same as the Ohio, the Brownhoist and the Industrial. It is a good crane.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Any guarantee with those that you are offering for eight thousand?

A. Only that they are in good condition. When we guarantee them we put them through the factory. They carry a year's guarantee. But these two that we have now we are offering for eight thousand, they have been overhauled and—

(Testimony of Hugh G. Purcell.)

Q. What acquaintance have you had with the Link-Belt crane?

A. No experience whatever except as a competitor, that is all; knowing the crane in competition with the cranes that we sell.

Q. Did you ever take in any?

A. No, we never did in my experience. I suppose other branches have.

Q. You don't know what the other branches took their's in at, do you?

A. No.

Q. Then you don't know anything about the sales of any second-hand Link-Belt crane as to what it cost?

A. Well, no definite knowledge of any crane, of any Link-Belt, that was ever sold except that they carry about the same value as the—

Q. You don't know what any second-hand Link-Belt crane ever brought, do you?

A. No; no.

Q. It is your guess that cranes of this type and character in good order and condition sell at about seven to eight thousand dollars; is that correct?

A. Yes, depending on the condition.

Q. Does it make any difference how long that crane has been manufactured and how long it has been in existence?

(Testimony of Hugh G. Purcell.)

A. It does not make as much difference as you think—It is more difference on how the crane has been used and treated is a greater factor than the age of the crane. The age of the crane is not always the determining factor. If the crane has been handled with reasonable care and kept in condition it is more important than the age of the crane.

Q. A crane that is eight years old, other things being equal, according to your formula, would be how much depreciated?

A. It would largely depend upon the ownership of the crane, how it depreciated. Different firms have different depreciations for them. Some wipe them out in five or ten years, the value entirely. It is entirely a matter of cost accounting valuations. I know a lot of firms we deal with and sell cranes wipe out the cost of a crane in six years, just wipe it off their books. Other men will wipe it off a small amount each year, carrying the depreciation over a number of years.

Q. Referring to the depreciation in terms of market value—

A. I could give you an illustration, if you want, of what I mean. I sold personally a crane here about four years ago and the company that used it used it very hard and broke a lot of it and then junked it and let the boiler freeze up and burst

(Testimony of Hugh G. Purcell.)

open, and the thing was all covered with cement and everything and really didn't have any value at all, a very small value the way it was treated; whereas, if that crane had been kept in any kind of condition and looked after like a piece of machinery should have, the depreciation would have been very small. You see what I mean.

Q. I gather from your answers then that second-hand cranes of similar type to this one in Seattle from 1926 to now bring about seven to eight thousand dollars?

A. Yes, if it is in good condition. If it is in poor condition I would say about seven thousand dollars. If it is in good running condition and the boiler is good, the tubes are in good shape and everything is in good shape, it ought to be worth seventy-five hundred dollars.

Q. That is regardless of its age?

A. Regardless of its age. Crane parts can all be replaced very readily, see. Wheels, car wheels and the gears and all that part, new tubes in the boiler, and a new shell on the boiler.

MR. COSGROVE: That is all.

MR. GORHAM: That is all, Mr. Purcell.

(Witness excused.)

MR. GORHAM: Now the statement of Mr. Summers, do you have it, Mr. Clark, Mr. Summers'

deposition? I am trying to get this testimony in order, if Your Honor please, and I think that closes our case with the exception of the evidence relative to the weather and the storm and the loss of the cargo on the barge, which would include all the camp equipment of Guthrie and would include the crane insured under this City of Tacoma policy and which was assigned to the Libellant. This is a statement made on the 23rd of December, 1927. It is not sworn to, both counsel having waived the oath. Oh, this is the witness Whitney. I want Mr. Summers'. That is in rebuttal.

THE CLERK: I don't know of any other deposition we have got here.

MR. GORHAM: We will have to ask permission, if the Court please, from the Court to introduce that tomorrow if we can find it between now and tomorrow by getting in communication with the Court Reporter who took it. It was taken several days ago.

MR. COSGROVE: In order to expedite this suppose you take the copy.

MR. GORHAM: Oh, have you got a copy? I never have had a copy.

(Paper handed to Mr. Gorham by Mr. Cosgrove.)

MR. GORHAM: This is good enough for me.

(Statement of Mr. Summers.)

THE COURT: Well, will that be filed?

MR. GORHAM: Yes, we will file this.

(William H. Gorham appeared for Plaintiffs and Howard Cosgrove appeared for Defendant as he has got it here.)

(Mr. Gorham read said statement, and proceedings were had thereon, as follows):

“STATEMENT OF M. B. SUMMERS,
Meterologist in charge of United States Weather
Bureau, Seattle, Washington.

BY MR. GORHAM:

Q. I hand you a statement”—

MR. GORHAM: Will that be satisfactory as to the statement? That is a carbon copy (showing).

MR. COSGROVE: Yes.

(Continuing reading):

“Q. I hand you a statement, Mr. Summers, dated February 6, 1926, out of this office, and ask you if that is your signature attached thereto?

A. Yes, it is.

Q. Is that statement made by this office?”

MR. GORHAM: This was at the weather bureau in Seattle.

(Continuing reading):

“A. Yes.

Q. That is a copy of the weather record as shown by the records of this office on that date?

(Statement of Mr. Summers.)

A. Yes.

Q. Will you interpret that statement, Mr. Summers, so that the Court may understand just what it means, your method of computing the gauge of the wind and what that statement refers to as to velocity of the wind at any hour?"

MR. GORHAM: So I will read now the statement, if the Court please.

(Reading):

“UNITED STATES DEPARTMENT OF
AGRICULTURE, WEATHER BUREAU,
Seattle, Washington.

February 6, 1926.

Chesley Tug & Barge,
Seattle, Washington.

Gentlemen:

In response to your telephone inquiry of this date, the following data, taken from the records of this office, are submitted:

The barometer at Seattle fell steadily from 5 a. m., February 2, 1926, until 9 p. m. of that date, and then rose steadily until 9 a. m., February 3, when it began to fall again. At 5 a. m. of the 2nd it read 29.82 inches; at 9 p. m., 29.43; and at 9 a. m. of the 3rd, 29.71. These readings are all reduced sea level.

The wind was from the southeast and east

(Statement of Mr. Summers.)

between 6 p. m. of the 2nd, and 12:30 a. m. of the 3rd and from the south until 7 a. m. The hourly wind movement during the 13 hours ending at 7 a. m., of the 3rd, was as follows: In the hour ending at 7 p. m., 8 miles; hour ending at 8 p. m., 5 miles; hour ending at 9 p. m., 10 miles; hour ending at 10 p. m., 10 miles; hour ending at 11 p. m., 18 miles; hour ending at midnight, 13 miles; hour ending at 1 a. m., 19 miles; hour ending at 2 a. m., 28 miles; hour ending at 3 a. m., 26 miles; hour ending at 4 a. m., 22 miles; hour ending at 5 a. m., 14 miles; hour ending at 6 a. m., 18 miles; and hour ending at 7 a. m., 12 miles.

For the 5 minutes beginning at 1:33 a. m. of the 3rd, the wind blew at the rate of 36 miles an hour, and in the 5 minutes beginning at 2:10 a. m., at the rate of 34 miles an hour. Both of these high velocities were from the south.

Respectfully,

(Signed) M. B. SUMMERS,

M. B. SUMMERS,

Meteorologist, in charge."

MR. GORHAM: Then he answers:

(Continuing reading):

"A. When the term 'hourly wind movement' is used it refers to the actual wind move-

(Statement of Mr. Summers.)

ment in any particular hour. By this is meant that if a feather is placed in the wind at the beginning of the hour, at the end of the hour the feather would be a certain number of miles away from the initial point. Thus, if the wind movement were ten miles in an hour the feather would have traveled ten miles in that hour.

Q. Let me ask you, those notations at the bottom as to increased velocity, how is that increased velocity manifested in your machine as against the hourly movement of the wind?

A. The weather bureau computes maximum velocities of the wind on a basis of the highest wind for a five minute period. This rate is always as high as or higher than the total wind movement for that particular hour.

Q. So that the memorandum in the last paragraph of your statement of February 6, 1926, the velocity for the five minutes beginning at 1:33 a. m., on the 3rd, the wind blew at the rate of 36 miles an hour, and in the five minutes beginning at 2:10 a. m. at the rate of 34 miles an hour, were the highest velocities reached in those respective hours?

A. Yes.

Q. And those excessive velocities were from the south?

(Statement of Mr. Summers.)

A. Yes, both of them were from the south.

MR. GORHAM: That is all.

BY MR. COSGROVE:

Q. The so-called high velocity five minute periods, are they noted by your office if the hourly wind movement is less than thirty miles an hour?

A. No, they are not.

Q. Then take your third paragraph of this statement in which you cover hourly wind movements for the thirteen hours ending at 7 a. m. on the 3d of February, 1926, the hourly wind movement during those thirteen hours was never in excess of thirty miles an hour, except as stated in the last paragraph of your statement, is that correct?

A. It was not above thirty miles an hour, except as indicated in the last paragraph of that statement.

Q. Now inquiring as to your term 'hourly wind movement,' does that mean that for that full hour, each and every moment of it, the wind was at the rate given in your third paragraph?

A. No, indeed.

Q. That rate might be higher or lower than the rate given by you, might it not?

A. It might be higher than given in the

(Statement of Mr. Summers.)

second paragraph but it would not be higher than given in the third paragraph.

Q. But it at no time would have been more than thirty miles an hour, except as noted in the last paragraph?

A. That is correct. We do not tabulate in our records maximum hourly velocities unless they exceed thirty miles an hour.

Q. At what point were those readings taken?

A. From the roof of the Hoge Building, Second and Cherry Streets, Seattle, Washington.

Q. How high is that above sea level?

A. 250 feet above the ground.

Q. You mean the ground at Second and Cherry?

A. At Second and Cherry. It would be somewhat higher than that above sea level. I could not give you the exact elevation of Second and Cherry.

Q. Compare the hourly wind movement on salt water and 250 feet above?

A. My opinion would be that right down at the surface of the water the wind would not be quite so high as it would at an elevation of 250 feet unobstructed by any buildings or any-

(Statement of Mr. Summers.)

thing of that kind, that up a short distance above the water the velocity would be somewhat greater than it would be at the surface, there being a certain amount of friction by the water on the air.

Q. What difference, if any, would be found or is found between hourly wind movements at Seattle and the point in Puget Sound a mile or a mile and a half off of Meadow Point?

A. I could not answer that question because it would be only an opinion. I never made any observations of wind velocities there at that point or any other point aside from the roof of the Hoge Building. But the velocity at any point in the Sound I would say would be dependent somewhat on the location of the point with respect to the wind at the time, in other words, the shore topography would affect the wind velocity to a certain extent, depending on the direction of the wind.

Q. It is hardly likely, is it, that during the thirteen hours you have mentioned in this statement, that the wind exceeded at the point I have just mentioned the hourly wind movements you have given in the statement?

A. I would not think so.

Q. What I intended to ask was, is it likely

(Statement of Mr. Summers.)

that at the point in the Sound I have just mentioned, and during the thirteen hours mentioned in your statement, that the wind velocity there was higher than the hourly wind velocities or hourly wind movements mentioned by you in this statement?

A. Will you put that question this way? May I make a suggestion to ask the question this way: Is it likely that the hourly wind movements at the point mentioned were higher than the hourly wind movements mentioned in your statement? You said velocity of hourly wind movements?

Q. Let my question be understood to be as stated by Mr. Summers.

A. I do not think they would.

Q. (By Mr. Gorham) Your answer in this includes the wind movement in the two five minute periods?

A. Yes.

Q. You think it would be at least that velocity at that point?

A. No; it would be higher than that.

Q. Do you know where Meadow Point is?

A. Only roughly. I am not well enough acquainted with the geography of the Sound to tell you that.

Q. I want to call your attention to the lo-

(Statement of Mr. Summers.)

cation north of Salmon Bay in Ballard and between the opening of Salmon Bay and Richmond Beach; it is just to the south of Richmond Beach; it is this side of Everett. The Government has no weather bureau station or wind gauge any nearer that point than the Hoge Building, does it?

A. No, sir.

Q. (By Mr. Cosgrove) Is it possible, Mr. Summers, supposing you have your station here on top of the Hoge Building and you had another one ten or fifteen miles away, for the other station to fall in at the same five-minute reading referred to ~~you~~ by you?

A. It is quite possible, that is, assuming that the elevation in the anemometer were the same.

Q. Is it possible that at the point in the Sound which I have just mentioned that during these two five-minute periods mentioned in your statement that the wind movement might not have been as stated here, 36 and 34 miles an hour?

A. It might not have been. Yes, that is possible. However, I do not think that the wind movement down near the surface of the water was any higher than these velocities as stated previously.

(Statement of Mr. Sumners.)

Q. That does not quite cover the question I intended to ask. Is it possible that at the two five-minute periods mentioned in your statement the wind movement at the point mentioned in the Sound might have been substantially less than that mentioned in the statement?

A. Well, that would depend on the local topography and the influence of the shore line. If the shore line were such as to obstruct the southerly wind then it probably could have been some less, considerably less or substantially less.

Q. If you had a level area at Seattle with no buildings or no obstruction of any kind whatever and the readings were taken from the same altitude at the same time, would these five minute periods of wind movements of five and ten miles practically show the same rates?

A. Practically the same. They might differ by a few miles, but they would show practically the same velocity.

Q. What do you mean by a few miles?

A. I would say that would not differ by more than four or five miles.

Q. Four or five miles is quite a difference?

A. It would depend somewhat on whether one place or the other were nearer the edge of the storm. Naturally there is bound to be some point in the storm where the maximum velocity

(Statement of Mr. Summers.)

over any particular area occurs and a gradually diminished velocity out towards the edges. That goes without saying. Now if one of those places were more nearly the edge of the storm area than the other place it would have a lesser velocity.

Q. (By Mr. Gorham) Is there anything to indicate whether the edge of this storm area was at the Hoge Building or at the point off Meadow Point on Puget Sound?

A. No, there would be nothing to indicate that.

Q. Then when you say it probably had less do you mean probably or possibly?

A. I said down at the surface of the water. The velocity down at the surface of the water here at the Hoge Building, if the Hoge Building were right beside the Sound, would be less than it was up here at 250 feet. That is what I had reference to when I said it was possibly less.

Q. (By Mr. Cosgrove) Mr. Gorham used the word 'storm.' Most all movements of wind are classified generally as storms, aren't they, by you?

A. When they reach thirty miles an hour. Anything less than that would hardly be classed as a storm. Of course that is a very elastic term.

(Statement of Mr. Summers.)

Q. That does not mean that you draw a dividing line of thirty miles to denote violence on the one part and calm on the other?

A. No, it does not.

Q. I notice in the second paragraph of this statement you have some barometric readings.

A. Yes.

Q. Are those changes in those readings unusual at that time of the year?

A. The magnitude of the changes is not unusual. But the fact that after reaching the minimum reading at 9 p. m. of the second, the barometer rose steadily until 9 a. m. of the third, and then started to fall again, was unusual.

Q. Is it not a fact that frequently at that time of the year the barometer rises to a point higher than mentioned here and then goes to a point lower, and vice versa?

A. Yes. Well, I would not say frequently, but I would say occasionally. I would not say frequently.

Q. What was there, if anything, unusual about that rise or lowering of the barometer, that you refer to the lowering of it or the rising of it?

A. In the fact that it started to fall after it had risen. There were two falls in the barom-

(Statement of Mr. Summers.)

eter noted. One was a minimum at 9 P. M. of the second. Then it started to fall again at 9 A. M. of the third after an intervening rise. But as I remarked, after 9 A. M. probably would not be pertinent to the case. I am only mentioning it because it appears here in the letter. That fall you refer to took place after 9 A. M. of the third.

Q. The second fall?

A. Yes, the second fall.

Q. After 9 A. M. of the third?

A. After 9 A. M. of the third.

Q. That is the unusual part?

A. That is the unusual part of the performance of the barometer.”

THE COURT: What was the time when this loss occurred?

MR. GORHAM: About 3:50 A. M. of the third, if Your Honor please.

(Continuing reading.)

“MR. GORHAM: That is all. Now, Mr. Summers, would you like to have this written out and read it?

MR. SUMMERS: Yes, I think it would be better.”

MR. GORHAM: So we left the duty of transcribing it to the Reporter. He has furnished Mr.

Cosgrove one, but not the original copy, but counsel agrees that these copies may go in.

MR. COSGROVE: Yes. I want to call attention to the last page of Mr. Summers' comment that the unusual part that he referred to was the fall after 9 o'clock on the third, which was after the loss.

MR. GORHAM: Yes, an unusual action of the barometer.

THE COURT: The Court will be at recess ten minutes.

RECESS.

MR. GORHAM: I would like this statement of Mr. Summers that we introduced marked as an exhibit, because it is only referred to in Mr. Summers' statement. We offer it as such, Mr. Cosgrove.

MR. COSGROVE: I beg pardon.

MR. GORHAM: We offer this statement signed by Mr. Summers that is attached to his statement.

MR. COSGROVE: No objection.

THE COURT: Admitted.

THE CLERK: It will be "9."

MR. GORHAM: (Showing paper to Mr. Cosgrove) And we offer this statement.

(Paper referred to admitted in evidence and marked Libellants' Exhibit "9.")

MR. GORHAM: We offer an extract from the tide tables Pacific Coast, North America, 1926, Department of Commerce, showing high and low water

time and height at Port Townsend and Seattle on February 2nd and February 3rd, 1926. We offer that in evidence. That is "10"?

THE CLERK: That is No. "10."

MR. COSGROVE: No objection.

THE COURT: Admitted.

(Document referred to admitted in evidence and marked Libellants' Exhibit "10.")

HARRY MORTENSEN, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. How old are you, Mr. Mortensen?

A. Forty-seven.

Q. What is your occupation?

A. Sailor; seafaring man.

Q. How long have you been a seafaring man?

A. Practically since I was seven years old.

Q. In what capacity?

A. Oh, in sailing ships and steamers all over the world.

Q. Have you been continuously in that occupation for the last twenty or thirty years?

A. No, sir. I have been longshoring and painting and several other occupations.

Q. How long have you been at sea altogether?

A. Practically ten years.

(Testimony of Harry Mortensen.)

Q. Is that including overseas?

A. Overseas and all.

Q. You are an employee of the Chesley Tug & Barge Company?

A. Yes, sir.

Q. How long have you been in their employ?

A. Probably two years within a month or so.

Q. In what capacity?

A. Oh, deck hand, cooking and second; in this instance here second.

Q. Do you know the tug Ketchikan II?

A. Yes, sir.

Q. Owned by the Chesley Tug & Barge Company?

A. Yes, sir.

Q. Is that a motor tug?

A. A motor tug, yes.

Q. How much of a crew does it carry?

A. Three at a time.

Q. A master, second and—

A. And the cook.

Q. —and the cook? Have you ever acted as second on the Ketchikan II?

A. Yes, sir.

Q. How long?

A. Two months; a few days short of two months.

(Testimony of Harry Mortensen.)

Q. How?

A. A few days short of two months.

Q. Have you ever acted as second on any other motor tug?

A. Yes, sir.

Q. Were you second on the Ketchikan II leaving Potlatch February 2, 1926, with the car barge Chesley No. 1 in tow with five cars and a locomotive crane on board—

A. Yes, sir.

Q. —bound for Seattle?

A. Yes, sir.

Q. What were your watches on that vessel on that voyage?

A. From 12 to 6 in the morning and 12 to 6 in the afternoon.

Q. Do you remember where you were when you went on watch at 12 o'clock midnight on the morning of February 3rd?

A. Yes, sir.

Q. Where?

A. Within a mile—a half a mile of Apple Tree Point; that is a light house.

Q. Bound for Seattle?

A. Bound for Seattle.

Q. You had come to that point from Potlatch?

A. From Potlatch, yes.

THE COURT: Just where were you?

(Testimony of Harry Mortensen.)

THE WITNESS: A half mile off the light.

Q. Is there a light at Apple Tree Point?

A. Yes.

Q. A State light?

A. It is a blinker.

Q. How long a hawser did you have out?

A. Practically four hundred feet, I should judge; I never measured it; four hundred feet at least.

THE COURT: I didn't catch all that last. A little less did you say?

THE WITNESS: At least four hundred?

THE COURT: At least four hundred?

THE WITNESS: Yes, sir; nothing less.

Q. What was the weather when you came on watch at 12 o'clock midnight of the morning of the 3rd?

A. Well, it was fairly good weather; it was a ten mile breeze, probably a twelve mile breeze blowing, as we judged.

Q. And you were within a half a mile of shore?

A. A half mile off shore.

Q. Off shore?

A. Yes.

Q. From that point did you follow the contour of the shore or did you strike out in the Sound?

A. I followed up to the next point, President Point, across Kingston Bay.

(Testimony of Harry Mortensen.)

Q. And how far off President Point were you when you passed President Point?

A. Three quarters of a mile I should judge.

Q. And what was the weather then?

A. It was practically the same.

Q. And about what time was it then?

A. It was about a little before 1 o'clock.

MR. COSGROVE: What was that last question and answer?

MR. GORHAM: What time was it then? And he said about 1 o'clock.

THE WITNESS: Yes; before 1 o'clock.

Q. What was your course from President Point?

A. To Seattle?

Q. What was your next course?

A. Southeast; a southeast course.

Q. Was that true or magnetic?

A. True.

Q. And how long did you run that course?

A. Well, it would be to the time the car barge—to the accident do you mean?

Q. Well, just how long did you run it; did you run it up to the loss of the car?

A. Yes.

Q. What was the weather from 1 o'clock on?

A. It was getting stronger wind. At 1:30 she was pretty strong.

(Testimony of Harry Mortensen.)

Q. And what was the condition of the sea from President Point on up to the time of the loss?

A. The further I got out it got heavier sea on account of the flood tide; the wind up against the tide made a pretty strong sea.

Q. When was it at its highest, do you know, the wind; do you remember?

A. About 2:30.

Q. And when was the sea the most boisterous?

A. The sea was the most boisterous after the squall was over, after the heavy weather.

Q. In other words, you had heavier sea after 2:30 than you did before?

A. Yes; around three o'clock.

Q. Do you know how fast you were going over the ground?

A. Oh, about a mile an hour.

Q. Could you see your barge?

A. I could see it, not plainly; pretty dark.

Q. Did the barge have lights on it?

A. Lights.

Q. What kind of lights?

A. Just little lanterns, you know, stern lanterns.

Q. How many lights did it have?

A. Two.

(Testimony of Harry Mortensen.)

Q. And how were they situated as regard the barge fore and aft or athwartships?

A. Fore and aft; the after light a little higher than the forward light.

Q. And how were they situated with regard to being in the center of the barge or on the starboard or port side?

A. On the center of the barge.

Q. Could you see those lights at President Point?

A. At all times.

Q. Were those lights on the barge or on the cars?

A. On the car.

Q. What was the last time you saw the lights?

A. About fifteen minutes past three or 3:15.

Q. Two-fifty?

A. Three-fifteen.

Q. Three-fifty?

A. Three-fifteen.

Q. Three-fifteen?

A. Yes, sir.

Q. And when did you lose your load?

A. It was at three-thirty that I seen the load was gone.

Q. Was that by your pilot house clock?

A. Yes; I think it was three-thirty.

(Testimony of Harry Mortensen.)

Q. Did you have any warning of the load spilling?

A. No, sir.

Q. Was there any stoppage in your engines after the time you left President Point until the barge spilled its load?

A. No stoppage. After the accident I stopped the engine and called the Captain.

Q. Was that the first time the engine had been stopped after leaving Point President?

A. Yes, sir.

Q. How did you know you spilled your load?

A. By looking at the scow, at the dark spot standing on end; I could see the end of the scow standing up, and when I stopped the engine she straightened out.

Q. You stopped the engines?

A. Yes.

Q. Could you feel it on board, the difference in the stress in your tow line, would there be any difference there?

A. No, I didn't notice anything at all; I didn't notice it.

Q. You saw the barge on end?

A. Yes.

Q. In the distance?

A. In the distance. It was pretty dark.

(Testimony of Harry Mortensen.)

Q. Well, did you know the cars went over then?

A. Yes.

Q. How did you know it?

A. I could see when the scow was lit up you couldn't see no cars on the barge.

Q. What did you do after spilling the cars off the barge?

A. The Captain came up and we started the engine again and proceeded to Seattle.

Q. How long after the spilling of the cars off the barge did the Captain come up?

A. He was up practically the same time; he was coming up when I was going to call him. He heard me stopping the engine and he come up.

Q. In crossing the Sound from President Point did the tug at any time take sea?

A. Yes, it was taking sea from 1:30 on over the deck all the time.

Q. To what extent did it take the sea?

A. Well, the tug was full of water several times; a pretty high sea going.

Q. How much freeboard is there on the Ketchikan forward?

A. From the water's edge you mean?

Q. Yes.

A. Oh, about six feet.

THE COURT: Freeboard?

(Testimony of Harry Mortensen.)

MR. GORHAM: Six feet he said, if the Court please.

THE COURT: Freeboard?

MR. GORHAM: Freeboard, yes, forward.

THE WITNESS: From the water up to the bow of the tow boat.

Q. How had the barge been riding under tow between Appletree Point or Apple Cove Point and Point President?

A. To all appearance like she done the whole trip.

MR. COSGROVE: I didn't get that answer at all.

THE WITNESS: To all appearance the way she done on the whole trip.

Q. And how was that?

A. Naturally the way we left Potlatch.

Q. Would you be able to estimate the velocity of the wind at its highest that night after leaving Point President?

A. I figured on thirty-five up to a forty mile wind at the highest.

Q. That is your judgment?

A. My judgment, yes.

Q. So far as you know, when you saw the barge in an upright position the cars all went off together?

(Testimony of Harry Mortensen.)

A. I could not tell.

Q. You could not tell; you do not know?

A. I didn't see it.

Q. You know that when she came back on an even keel or level the cars were all gone?

A. The cars were all gone; you couldn't see nothing but just a shadow.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. What time did the tug and tow leave Pot-latch?

A. Six o'clock on the second; six o'clock in the morning.

Q. Were you awake and up at that time?

A. Yes.

Q. Were the Captain and the other member of your crew awake and up?

A. Yes.

Q. At six o'clock in the morning, that is February 2nd?

A. Yes, sir.

Q. How light was it then?

A. Not very light.

Q. Rather dark at that time, wasn't it?

A. Well, it all depends on the moon, you know. Sometimes it is pretty light. I don't remember.

(Testimony of Harry Mortensen.)

Q. I am asking you how it was at this particular time?

A. I could not tell you.

Q. You don't recollect whether there was any moon or not?

A. No.

Q. Was there any moon at the time of the loss?

A. No, sir.

Q. What?

A. No, sir; I don't remember seeing the moon.

Q. You don't remember whether there was a moon or not?

A. No.

Q. Now at the beginning of the voyage at six o'clock in the morning where did you pick up this barge?

A. At Potlatch.

Q. I know, but was it on the gridiron or off the gridiron?

A. It was on the gridiron when we picked it up.

Q. It was on the gridiron when you picked it up?

A. Yes, afloat; the tide lifted it up over the grid at the time we took it.

Q. How did you take it off of the gridiron?

A. Put a tow-line on it and took it off.

(Testimony of Harry Mortensen.)

Q. Fastening aft or forward?

A. Forward; aft on the tow-boat; on the fore part of the scow; the towing end of the barge; on the after end of the boat.

Q. You had lines on both ends?

A. Both ends of the scow, no, sir.

Q. They were on the forward end?

A. On one end of the scow the bridle, what we call the bridle.

Q. That is the end—

A. The high end.

Q. —on which the cars were loaded?

A. Yes, sir.

Q. Immediately upon pulling the barge off the gridiron did you begin voyage to Seattle?

A. Within a few minutes.

Q. Do you know when the cars were put on the barge?

A. They were put on—I could not tell the exact time, but I know they were put on the day before.

Q. Do you know what time the day before?

A. I could not tell you. It was in the afternoon sometime.

Q. Did you have anything to do with putting them on the barge?

MR. GORHAM: If the Court please, this is not cross examination. That is the respondent's case.

(Testimony of Harry Mortensen.)

If the Court will indulge me just a moment, as between an insurer and insured there is a presumption of law of seaworthiness. That is the ruling of our Circuit Court of Appeals and that is the ruling of the English courts. Brown of the Southern District of New York said that where there is presumption of law there need be no averment and where there is no averment there need of course be no proof. We have not alleged seaworthiness of this barge. The law presumes it is seaworthy. The burden is not upon the insurer, the respondent here, to allege and prove unseaworthiness. That is the respondent's case and they should not be permitted, unless we have gone into it ourselves, to cross examine the witness on the question of the seaworthiness of that barge. That is on their own initiative. If they will make the witness their own witness then we can't object, but they have no right under the law to cross examine this witness upon the matter of seaworthiness of that barge as to its storage or the other defenses they have when we have not gone into it in our case in chief.

THE COURT: Objection overruled.

MR. GORHAM: We take an exception, if the Court please.

THE COURT: Allowed.

MR. COSGROVE: Read the question.

(Testimony of Harry Mortensen.)

(Question read.)

A. No, sir, only representing the Captain with this stowage.

THE COURT: I don't hear all you say.

Q. Did you have anything to do with putting these cars on this barge?

A. The train put them on. I staid on the barge when they were put on, but I take my orders from the Captain what to do.

Q. Did you do anything in connection with the putting of the cars on the barge?

A. By securing them.

Q. You secured them?

A. Helping to secure them.

MR. GORHAM: Just a minute, Mr. Cosgrove. If the Court please, may my objection run to all this examination?

THE COURT: It will be so understood.

MR. GORHAM: Then my exception to the Court's ruling.

THE COURT: Exception allowed.

Q. Who did the securing of the cars?

A. The train crew and the Captain and me.

Q. The train crew and the Captain of the barge and you?

A. No, the Captain of the tow-boat.

Q. The Captain of the tow-boat and you?

(Testimony of Harry Mortensen.)

A. Yes.

Q. Who was the other member of the crew?

A. The cook.

Q. What was his name?

A. Mikelson.

Q. Your name is Mortensen?

A. Yes, sir.

Q. And they had a cook by the name of Mikelson?

A. Yes, sir.

Q. Did Mikelson assist in the loading and fastening of these cars on the barge?

A. I could not tell you if he was there that particular time, but lots of times he did help us. He was cook.

Q. You don't know whether he did or did not this time?

A. I could not tell you.

Q. What did you do with helping fasten these cars on the barge?

A. Helping with the timbers.

Q. What particular things did you do?

A. Helping all around with everything.

Q. What did you do now? Just simply saying you helped— What did you do?

A. I helped to put in the cross pieces on the back end of the trucks of the center car, the center

(Testimony of Harry Mortensen.)

of the crane, in between the—what do you call them—the after timber on the barge, helped to put timbers in under the wheels to stop them from rolling back and forth, and the same on the front.

Q. I will go back of that a little bit. How were the cars put on the barge; what force brought the cars on the barge?

A. A locomotive.

Q. That is the locomotive that brought them down from Lake Cushman?

A. I could not tell you whether it was the same or—

Q. And when they were being backed on where were you?

A. I was on the barge.

Q. Who did the signalling as to how far these cars would go on the barge?

A. The train man.

Q. Who?

A. The train man; the conductor.

Q. Did you have anything to do with that?

A. No.

Q. Now when they ran these cars on the barge was there any blocking or timbers already laid between the after end of the barge and the cars?

A. There is always a stationary timber on the after end of the barge bolted on stationary all the time.

(Testimony of Harry Mortensen.)

Q. All right, but was there anything in front of that?

A. No, sir.

Q. Nothing in front of that stationary timber?

A. No, except the rails, that is all.

Q. Which track did they put cars on first?

A. I could not tell you.

Q. You don't know?

A. I don't remember.

Q. How many tracks did the barge have?

A. Three tracks.

Q. How many cars went on each track?

A. Two on each side and the gondala and the crane in the center.

Q. Now did they run all those cars right up against this bolted log on the end?

A. The outside cars probably they did, but the center car they did not. The wheels on the crane would not reach it; they overhang—they didn't come up close enough, that is the car we blocked off between the truck.

Q. Now let us take the cars on the outside tracks; those wheels you think ran right up against this bolted log?

A. Yes, sir.

Q. There were no timbers, ties or anything between the bolted log and the wheels; were there or weren't there?

(Testimony of Harry Mortensen.)

A. I don't think so.

Q. Were you working at that end helping block?

A. I was helping all around; not exactly; I can't tell you exactly.

Q. All right. Now let us go to the middle track. Was there any timber, loose or otherwise, just forward of the bolted timber, the one bolted to the deck?

A. Not at the time it was put in there.

Q. All right. Then on the middle track the crane and the gondola were run on the barge and stopped some place short of this bolted timber, didn't quite go that far?

A. Didn't go that far.

Q. About how far away did they stop the car?

A. About probably eight inches.

Q. Eight inches?

A. Yes, something like that.

Q. How far would the wheels be from the bolted timber?

A. Eight inches.

Q. About eight inches.

A. The lower part.

Q. How?

A. The lower part of the wheels on the track.

Q. Yes, about eight inches. Now was there

(Testimony of Harry Mortensen.)

anything put in between the wheels of that crane and the bolted timber?

A. Yes, sir.

Q. What was put in?

A. A timber six by eight or maybe eight by ten; I could not tell.

Q. What was it; a railroad tie?

A. A railroad tie, yes.

Q. What kind of a railroad tie was it?

A. Well, not square. It was six by eight or eight by ten. I could not tell you.

Q. Was it round on one side or two sides?

A. Not round. It was flat.

Q. Square?

A. Not square.

Q. Did it have square sides?

A. Square sides, yes, but not square.

Q. And that was shoved in between the wheel and the bolted timber?

A. Yes.

Q. There was only one timber bolted, was there?

A. One timber bolted.

Q. And how many ties did you use; how many loose ties did you use in the after end fastening or blocking the crane?

A. On the after end one.

Q. Just one; that was one tie; that was the

(Testimony of Harry Mortensen.)

only loose timber you used on that end in blocking the crane?

A. Yes.

Q. Over on the same end, the after end, on the outside tracks you used how many timbers? Let us say we take the starboard side now; how many timbers did you use between the wheels and this bolted timber?

A. None as near as I can recollect.

Q. The wheels right up against the bolted timber?

A. Yes.

Q. And that was the same on the port side?

A. The same on the port side.

Q. Now how were those fastened on the opposite end of the barge?

A. With timbers; one timber across in front of the wheel trucks and then two timbers, one on each side, wedged in.

Q. One end resting on the deck, the other end—

MR. GORHAM: He didn't say on the deck.

A. One on the timber and one on the deck and then wedged in between.

THE COURT: I don't understand that.

Q. You had a timber across the rails?

A. Yes, one timber.

(Testimony of Harry Mortensen.)

Q. Lying on the rails?

A. Laying on the rails.

Q. And up against the wheels of the car?

A. Up against the wheels of the car.

Q. Now did you fasten any brakes?

A. No, sir.

Q. Who did?

A. The brakeman; the train crew.

Q. The train brakeman?

A. Well, the conductor.

Q. The conductor?

A. Yes.

Q. Did Mr. Nelson set any brakes?

A. Maybe he did. I could not tell you. He was always helping.

Q. Did Mr. Mikelson set any brakes?

A. Maybe he did. I could not tell you.

Q. You didn't set any brakes?

A. No.

Q. You didn't see any set, did you?

A. Yes, sir; I did.

Q. Who did you see set brakes?

A. The train men.

Q. You didn't see anybody but the train men?

A. No, I couldn't say that I did.

Q. What time of day was it?

A. It was in the afternoon between three and six; daylight.

(Testimony of Harry Mortensen.)

Q. When you left Potlatch on the morning of the 2nd, who was on watch?

A. We were all on watch at the time.

Q. Who was at the wheel?

A. The Captain.

Q. And what kind of weather was it when you left?

A. Fine weather.

Q. How long did the weather continue fine?

A. Until we reached Foulweather Bluff.

Q. Until you reached Foulweather Bluff and that is outside the canal?

A. That is outside.

Q. What time did you reach Foulweather Bluff?

A. Somewhere around the evening. I could not set the exact time. The early evening.

Q. You don't know what time it was then?

A. No, sir.

Q. It was after you had gone on watch?

A. Well, lots of times we are up between watches, too.

Q. Well, you were up at six o'clock that morning when you left?

A. Yes, sir.

Q. And how long did you stay up or did you go to bed again?

(Testimony of Harry Mortensen.)

A. I went to bed after everything was straightened out.

Q. That morning after everything was straightened out?

A. Yes.

Q. Now when did you get up again?

A. Twelve o'clock at noon.

Q. You got up at twelve o'clock noon?

A. Yes.

Q. And you were awake and up until the loss the next morning?

A. No, sir. I was up until six o'clock that evening.

Q. Up until six o'clock?

A. Yes, sir.

Q. And you turned in?

A. Turned in until twelve o'clock midnight.

Q. Twelve o'clock midnight you were up again?

A. Yes, sir.

Q. Now you had good weather up until you reached Foulweather Bluff and that was while you were on watch when you got to Foulweather Bluff?

A. No; the Captain was on watch.

Q. The Captain was on watch?

A. I might have been up at the same time. I can't remember.

(Testimony of Harry Mortensen.)

Q. But there was no bad weather prior to that time?

A. No.

Q. Everything rode along all right?

A. Everything fine.

Q. Do you know what time you passed Point No Point?

A. I was asleep. I didn't know.

Q. You think you had a thirty-five to forty mile wind—

A. Yes, sir.

Q. —at the time of the loss? How long had this wind continued at that speed or that velocity?

A. Thirty minutes; I think it was the strongest about thirty minutes.

Q. Before that it was good weather?

A. No, not good weather. There was a little wind blowing ten miles and twelve and thirteen; it was changing.

Q. Then this bad weather you are talking about existed for about thirty minutes before the loss?

A. It was 2:30, around 2:30 up to 3 o'clock was the heaviest wind.

Q. Well, was it eased off then at the time of the loss?

A. Yes, but a heavier sea was running.

Q. How was your tide?

(Testimony of Harry Mortensen.)

A. Flooding, against the wind.

Q. You came on at 12 o'clock midnight?

A. Yes, sir.

Q. Where were you then?

A. At Appletree Point, a half a mile off Appletree Point.

MR. COSGROVE: Have we got an easel?

(Conference between respective proctors and charts placed on easel.)

Q. How far is it, Mr. Mortensen, from Point No Point to Apple Cove Point; do you remember?

A. Between six and seven miles.

THE COURT: Appletree Point?

MR. COSGROVE: Apple Cove Point.

THE COURT: I thought he was talking about Appletree Point.

THE WITNESS: Appletree Point.

Q. You mean Apple Cove Point?

A. Apple Cove Point.

MR. GORHAM: There is Appletree Cove and Apple Cove Point.

Q. Did you call the Captain at any time during the heavy wind?

A. I was on my way to call him, but he came up at 2:30.

Q. Well, I thought you went to call him because you discovered the cars were gone?

(Testimony of Harry Mortensen.)

A. That was later on.

Q. Did he get up during this wind?

A. He got up at 2:30.

Q. Where was the cook?

A. Asleep.

Q. Did the Captain take the wheel—

A. No, sir.

Q. —in this terribly bad weather?

A. No, sir.

Q. You called him what time; 2:30?

A. I didn't call him. He came up. I was going to call him. He came up himself.

Q. How long did he stay up?

A. Probably fifteen minutes.

Q. And then went back to bed?

A. Went below again, yes.

Q. At that time the cars were still on board?

A. Yes, sir; everything looked natural.

Q. And everything looked all right?

A. Yes.

Q. You didn't think at that time there was any trouble coming?

A. No; we were proceeding slowly and—

THE COURT: Just when was this; 2:30?

THE WITNESS: 2:30 when the Captain was up.

Q. And the Captain went back to his berth?

(Testimony of Harry Mortensen.)

A. Fifteen minutes or so, a few minutes after, about fifteen minutes after.

Q. Did you keep any record of your weather and your time coming down on this voyage?

A. We always keep a log passing different points and the barometer readings and so on; we always do.

Q. If you get any weather does that appear in there?

A. I beg pardon?

Q. If you get any weather does that appear in the log book?

A. No, not always.

Q. You never put any weather in the log book. If you got an unusual wind would you put it in there?

A. I probably wouldn't. I don't say that the Captain didn't do that, but on my watch I never did so far.

Q. In your log book would you put down an unusual wind?

A. No.

Q. You would not put anything down?

A. No; just the barometer reading and the course and so on.

Q. Did you have a barometer on this boat?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. Are you sure?

A. Yes, sir.

Q. Did you put any barometer readings in the log book?

A. Yes, sir.

Q. On this voyage?

A. On that voyage; yes, sir.

Q. How do you recollect the time?

A. I don't recollect the time.

Q. How do you know that a wind came up at 2 o'clock or 2:30 or any other time?

A. I was right there.

Q. How do you know it was at that particular time?

A. We have a clock that strikes every half an hour.

Q. I know, but that was two years ago; how do you recollect?

A. I recollect.

Q. It is just a good recollection, just a good memory you have?

A. It is memory. It is facts.

Q. That is all you have got to stand on is your memory?

A. Memory, yes.

Q. And your memory is a good memory?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. And it is just as good about the blocking of these cars as it is about the time when the weather increased and fell away, just as good?

A. Practically; yes, sir.

Q. So we will turn it around now and your memory is just as good as to the weather as it is as to the blocking, is it?

A. Yes, sir.

MR. GORHAM: As it is to what?

MR. COSGROVE: As to the blocking. Will you produce the log book for us please.

(Mr. Gorham handed book to Mr. Cosgrove.)

Q. What is this book I hand you?

A. That is the log book, but I don't remember, I can't tell—

Q. What is it?

A. The log book of the ship.

Q. The log book of the Ketchikan II?

A. Yes, sir.

Q. Will you please turn to the log that was kept for February 2nd and 3rd, 1926?

A. There it is. (Handing.)

Q. Will you read the log?

A. This is not my writing. It is the Captain's writing.

Q. Can't you read his writing?

A. Oh, I could, but I would rather you would.

(Testimony of Harry Mortensen.)

Q. Well, will you please read it; read the log for the 2nd and 3rd.

A. Is that it; the second month, the second day, 6:10 A. M. left Potlatch with car barge No. 1 for Seattle.

Q. What next do you find?

A. Second and the third lost load; the second month, the third day, lost load at 3:50 A. M., about one and a quarter mile of Meadow Point.

Q. Is there anything else there in the—

A. Proceeded Seattle with the wrecked barge.

Q. Is there anything in there—

A. At moorings 8:15 A. M.

Q. Is there anything in there relative to the weather—

A. No, sir.

Q. —on either the day of the second or the third?

A. I don't see anything.

Q. You don't see anything?

A. No, sir.

Q. Is there anything in there showing a reading of a barometer on the second or the third?

A. No.

Q. You talked about reading a barometer?

A. At times; not all the time. I didn't state—

Q. Did you read the barometer once on the second or third?

(Testimony of Harry Mortensen.)

A. I don't recollect.

Q. You don't recollect?

A. No. It is natural I would, and seafaring men always do. The Captain he should keep the log book.

Q. When you are at the wheel aren't you supposed to keep the log?

A. Keep the log and state what time we pass certain points and so on. It is not always I write in the log book.

(Conference between respective proctors.)

MR. COSGROVE: It is agreed between counsel, if the Court please, that the log book shows the log book of the Ketchikan II for February 2nd and 3rd, 1926, as read by the witness and nothing else appears therein.

Q. Now the time of the loss you said was 3:30 in the morning?

A. 3:50 or 3:30.

(Conference between respective proctors.)

Q. How is that?

A. I said 3:30.

Q. You said 3:30?

A. Yes.

Q. At that time what was the condition of the sea?

(Testimony of Harry Mortensen.)

THE COURT: He says it was 3:30, but he is now changing his reading of the log, is that the way I understand it? The log, as I understand, reads 3:50.

MR. GORHAM: The log reads 3:50.

THE WITNESS: 3:50, when we proceeded to Seattle, Your Honor, with the barge after spilling the load.

Q. Well, without quarreling over the exact moment of the loss what was the condition of the sea at the time of the loss?

A. It was—the sea was heavy but the wind moderate.

Q. I am asking about the sea.

A. The sea was quite high.

Q. Was it choppy?

A. Choppy, yes.

Q. It was choppy?

A. Yes.

Q. Had it been choppy for any length of time?

A. It was getting worse after the wind went down, the sea was getting higher, going up against the tide.

Q. I refer now to this period just before the loss; not after the loss; the period before the loss; was the sea high then?

A. Yes, the sea was high.

(Testimony of Harry Mortensen.)

Q. It was high?

A. Yes.

Q. And was it choppy, rough?

A. Rough. Water come on board that boat all the time, on the tow boat, over the bow.

Q. The sea was not smooth, was it?

A. No, sir.

Q. When did you find a smooth sea after two o'clock in the morning?

A. I didn't find it until late after the loss of the scow.

Q. Until after you lost the scow?

A. Yes; we were getting in smoother water after we proceeded to the shore line.

Q. How long before the loss had the sea been choppy?

A. How long before the loss?

Q. Yes, how long before the cars went overboard had the sea been choppy?

A. I really don't know how you want me to answer that question.

Q. Well, had it been a half an hour or an hour or what period?

A. The sea was stronger after the wind went down, the sea was getting higher; the wind was at its highest at 2:30 and the sea getting higher after the wind went down.

(Testimony of Harry Mortensen.)

Q. I understand that is what you said a while ago, but you now say that the loss took place at 3:30. It does not make any difference whether it was at 3:30 or 3:50 so far as this question is concerned. How long before the loss or what period, what was the length of time before the loss that the sea was choppy?

A. Approximately two hours; an hour and a half; say an hour and a half.

Q. Well, that is from the time the bad weather started?

A. Yes.

Q. It continued choppy up until the time of the loss?

A. Yes, sir.

Q. There was no smooth sea during any of that time?

A. No.

Q. You are sure of that now?

A. I am sure.

Q. Absolutely sure?

A. Absolutely sure.

Q. There is no question in your mind?

A. No question in my mind.

Q. Did you sign any protest; do you recollect signing a protest?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. What kind of a wind did you have at the time of the loss?

A. A southerly wind.

Q. I will ask you to take a look at this document and see if that is your signature, that second signature?

A. That is mine.

Q. That is your signature?

A. Yes, sir.

Q. Dd you know what that document is?

A. Yes.

Q. What is it?

A. It is a statement.

Q. It is your protest, is it?

A. Protest or whatever you call it; I don't know.

MR. COSGROVE: We offer this in evidence.

THE COURT: Admitted.

MR. GORHAM: No objection.

MR. COSGROVE: Now I want to read what you said here over your signature.

THE COURT: What will that be?

THE CLERK: That will be Respondent's "A-3".

(Paper referred to admitted in evidence and marked Respondent's Exhibit "A-3".)

(Testimony of Harry Mortensen.)

Q. You just got through saying that the sea was choppy for a couple of hours before the loss?

A. I said an hour and a half.

Q. All right, an hour and a half, and there was no smooth sea?

A. No smooth sea.

Q. Now we will read this: "That after said tug with said barge in tow had been at sea about twenty-two hours, namely on the 3rd day of February, 1926, at the hour of about 3:50 o'clock A. M., and while said tug with said barge in tow was off Meadow Point about one and one-quarter to one and one-half miles, the tide then flooding and the sea then being smooth with a heavy swell running and a strong southerly wind prevailing, the said barge under the influence of wind and sea spilled her said cargo and said cargo became a total loss." Now which was right, now when you are testifying that there was no smooth sea or when you made this protest and said there was a smooth sea?

A. I don't understand what you are saying.

Q. Were you right now or right then?

A. I was right in this way: The wind was blowing and it could not be smooth at any time; the wind was blowing all the time from 1:30 to probably 3 o'clock and it could not be smooth.

Q. It could not be smooth?

(Testimony of Harry Mortensen.)

A. No, sir.

Q. Then that statement is wrong.

A. I don't understand it. It said the swell was running.

Q. You read it for yourself and see if you can find a smooth sea. (Handing.)

A. It could not possibly be smooth. There is an error there in that statement, there must be. The sea could not be smooth.

Q. Of course you know that was under oath; you swore to it at the time before Mr. Gorham here?

A. But still the swell was running—

Q. Just a minute. You swore to that at that time, didn't you?

A. The swell was running. It states right there the swell was still prevailing.

Q. You swore to that at that time, didn't you?

A. Yes.

Q. And you are swearing now, and both statements do not agree.

MR. COSGROVE: That was offered in evidence.

Q. (Continuing) Did you have any other books, record books of this boat carried on board that boat than this particular log book that we have in evidence here?

A. No, sir; I never seen any other.

(Testimony of Harry Mortensen.)

Q. Now how do you know, now tell me, how do you figure that at 3:30 this loss took place and that at 1:30 the breeze started and that at any particular time you were off Apple Cove Point; how can you remember those particular hours and parts of hours, fifteen minutes here and thirty minutes there past the hour; how can you remember that?

A. Well, I sure can remember it; it was impressed upon my memory so plain as anything that happened yesterday. You always when a man is in a predicament like that you pay attention to know what he is doing and at that time after the loss in checking it all over impressed it on my memory so it is just as clear as if it happened to-day to me, the whole thing right after the time I got on watch to the time we proceeded to Seattle and tied up the barge.

Q. Why is it that you cannot remember who did the blocking and what you all did?

A. Well, we all helped together; no set piece of work for me or for the Captain; we all helped together.

Q. Where did these timbers come from that you used for blocking?

A. They all was on the barge, plenty of them.

Q. Where were they supplied; how did they come to be on the barge?

(Testimony of Harry Mortensen.)

A. They are continually used on the same with different cars and so on.

Q. How many sticks did you have available on the barge?

A. There is plenty at all times.

Q. I asked you how many?

A. I could not tell you the exact number.

Q. Well, twelve, fifteen or twenty?

A. Well, there is plenty. I could not tell you the exact number.

Q. Plenty is no answer at all. How many; was it ten?

A. I could not tell you.

Q. You are not sure you had ten, are you?

A. No, I would not say anything; I could not tell the number.

Q. You are not sure you had ten of them and yet you were using them right along, were you?

A. Yes.

Q. How long had you been running on this barge at the time of that loss; how long had you been working there?

A. On the boat or the barge?

Q. How long had you been working—

A. Two months altogether I was employed on the Ketchikan II.

Q. Yes, carrying cars on barges?

(Testimony of Harry Mortensen.)

A. Not always.

Q. Frequently?

A. Frequently, yes.

Q. And this barge always had these same sticks on her?

A. The same sticks on; lots of timse getting new ones.

Q. And you are not sure whether you had ten sticks on there at this time or not?

A. I am sure we had ten, but I could not tell you the exact number.

Q. What were they; ordinary railroad ties?

A. Different kinds.

Q. What were the other kinds that were not railroad ties?

A. Smaller ones and bigger ones, six by eight, eight by ten, ten by twelve and four by six, and two by six, all kinds of lumber always on board.

Q. That was furnished at Seattle, was it?

A. I don't know where. We get them any place we need them.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Mr. Mortensen, you say the crane and the gondola car were on the center track?

A. Yes.

(Testimony of Harry Mortensen.)

Q. Was the gondola car and the crane as long as the two cars on either side of it?

A. I could not tell you.

Q. You don't remember?

A. No.

Q. Was the crane after the gondola; was the crane in the stern or the gondola in the stern?

A. The crane was in the stern.

Q. They took it on the barge and spotted it?

A. Yes.

Q. Now do you remember how far from the bumper on the stern of the barge it was that they spotted the crane?

A. I could not exactly tell by inches, but I know it was blocked up in between there, whatever it be; probably six or eight or ten inches; I could not tell.

Q. Were there any fore and after ties between the bumper and the tie under the wheel of the crane?

A. I could not tell.

Q. You don't remember?

A. I don't remember; no, sir.

Q. What was the size of this bumper, do you remember, the dimensions?

A. About sixteen inches to eighteen inches high; I am not sure, but pretty near.

(Testimony of Harry Mortensen.)

Q. Was there anything in front of that bumper and lying on the deck—

A. No, sir.

Q. —any timber—

A. No, sir.

Q. —that you remember?

A. Not stationary.

Q. Was there any movable timber there?

A. No; put them afterwards for blocking, at any time we need them we put blocks.

Q. Was there a tie across the track under the wheels?

A. On the crane.

Q. On the crane?

A. Yes, sir; maybe two.

Q. At each end of the crane?

A. Each end.

Q. Each end of the crane?

A. Yes.

Q. Now take the gondola—Was there a tie under the wheels at the after most truck of the crane? Take the crane, was there a tie underneath the wheels or against the after wheels of the crane?

A. I don't understand the question.

Q. Well, you have got your crane and your gondola car in the center track?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. And the crane was at the stern of the scow?

A. Yes.

Q. Now take the crane, was there any tie against the wheels on the after end of the crane across the track?

A. Yes, sir; we put blocking there.

Q. And was there any ties running between that tie across the track and the bumper?

A. I could not tell.

Q. You don't remember. Now take the outside track. There were two cars on each outside track, weren't there?

A. Yes.

Q. And they were spotted on the barge by the locomotive and the train crew?

A. Yes, sir.

Q. Was there any tie across the track against the rear wheels of each of these two rear cars?

A. No, sir; I don't think so.

Q. Nothing to block the wheels?

A. Only the bumper on the rear.

Q. Went right up against the bumper?

A. I am pretty near sure.

Q. And on the forward end were there ties across the track against the wheels?

A. Yes, sir.

Q. The forward end of all the cars—

(Testimony of Harry Mortensen.)

A. All the cars.

Q. —on the three tracks?

A. Yes, sir.

Q. And I understand you to say there were then ties put diagonally under the journals?

A. Yes, sir; and wedged.

Q. And wedged in?

A. Yes, sir.

Q. And how far were those forward trucks on those three tracks, the extreme end of each truck, how far were those trucks from the stem of the barge?

A. About six feet; I am not sure, but between five and six feet; I won't be sure.

Q. You didn't set the brakes?

A. No, sir.

Q. The train crew set the brakes?

A. Yes, sir.

Q. Were the brakes first set by air or otherwise?

A. I could not tell you.

Q. Were the brakes ever set by hand to your knowledge?

A. Yes, sir; I seen them with a little stick on the wheels where they used that for a lever in setting them.

(Testimony of Harry Mortensen.)

Q. On how many cars did they set the brakes by hand?

A. They set all the cars with the wheel on top except that way with the lever, have a piece of iron or a piece of stick.

Q. Did they set the brakes on the gondola car that way?

A. Yes, sir.

THE COURT: We will interrupt the trial at this time and it will be resumed at 10 o'clock tomorrow morning and adjourn court until 10 o'clock tomorrow morning.

Further proceedings were continued to 10 o'clock A. M., December 28, 1927.

December 28, 1927, 10 o'clock A. M.

All present;

Proceedings resumed as follows:

THE COURT: You may proceed.

HARRY MORTENSEN, produced as a witness on behalf of the Libellants, resuming the stand, testified as follows:

REDIRECT EXAMINATION (Resumed).

BY MR. GORHAM:

Q. Mr. Mortensen, I understand there were three tracks on that barge?

A. Three tracks; yes, sir.

(Testimony of Harry Mortensen.)

Q. And there were two cars on the outside tracks and the crane and a car on the center track?

A. Yes, sir.

THE COURT: Two cars on each outside track?

MR. GORHAM: On each outside track. There were five cars altogether and the crane.

Q. I understand you to say that the cars on each track were five or six feet from the stem of the barge; is that right—

A. Yes, sir.

Q. —approximately?

A. Yes, sir.

Q. Had you ever acted as second on the Ketchikan when cars were loaded on that barge at Seattle bound for Potlatch?

A. Yes, sir.

Q. How many times approximately; more than once or twice?

A. Yes; four or five times; I could not say for sure.

Q. Referring to the 2nd day of February, 1926, when the cars and the crane that were lost were loaded on this barge at Potlatch, were they blocked that day on the 2nd of February in a manner similar to the blocking of cars on that barge leaving Seattle for Potlatch?

A. Yes, sir.

(Testimony of Harry Mortensen.)

MR. COSGROVE: Oh, I object, if the Court please, because the manner of blocking that day similar to any other day is not any test of sufficient blocking.

MR. GORHAM: It is not a question of sufficiency. It is a question of fact I am trying to find out. The Court will determine whether or not it is sufficient.

THE COURT: Objection overruled.

Q. What did I understand your answer?

A. In the usual manner of blocking leaving either Seattle or Potlatch, either place.

Q. In other words, the blocking that day leaving Potlatch was the usual manner of blocking that prevailed when the barge left Seattle with cars?

A. Yes, sir; practically the same.

MR. GORHAM: That is all.

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. Was the crane blocked on this voyage in the usual manner in which you previously blocked cranes?

A. I never was employed while we handled a crane.

Q. You never saw a crane blocked before on a barge?

A. No, sir.

(Testimony of Harry Mortensen.)

Q. Do you remember when the crane was taken up to Potlatch?

A. No, sir.

Q. You were not on the barge when it was taken up?

A. No, sir.

Q. One more question about the wind. I think you said that at the time of the loss the wind was forty or forty-five miles an hour.

A. No, sir. From thirty-five to forty in my judgment.

Q. Thirty-five to forty?

A. Not at the time the barge was lost, but during the time—during the night, 2:30 and 3 o'clock A. M. on the 3rd day of—

Q. Between 2:30 and 3 o'clock it was how much?

A. Between thirty-five and forty; that is my judgment; now I could not say exact.

Q. What was it after 3 o'clock?

A. Moderating.

Q. Well, to what extent did it moderate after 3 o'clock?

A. I could not tell exactly.

Q. Well, haven't you got any estimate? You estimated the wind was thirty-five to forty miles between 2:30 and 3.

(Testimony of Harry Mortensen.)

A. It was a ten or twelve mile breeze after three o'clock; I could not say exact.

Q. A ten or twelve mile breeze after 3 o'clock?

A. Yes, sir.

Q. And it continued with moderation up to the time of the loss?

A. Yes, sir.

Q. How do you know it was thirty-five or forty; how do you get such an estimate as that?

A. By experience.

Q. What test do you have to determine—

A. I have no test only my own knowledge by being at sea at times and hearing other people talking and using my judgment and so on in different matters.

Q. Do you have any test at all? Were you in the pilot house—

A. Yes, sir.

Q. —at the wheel?

A. At the wheel.

Q. Do you consider that wind between 2:30 and 3 o'clock unusual?

A. I beg pardon.

Q. Do you consider that wind between 2:30 and 3 o'clock unusual for that time of year for that place?

A. No; early in the spring often times it happens we have the same kind of wind at times.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

ALEX FARMER, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. What is your full name?

A. Alex Farmer.

Q. What is your business, Mr. Farmer?

A. Engineer with the Kitsap Transportation Company.

Q. How long have you followed the sea?

A. Since I was nine years old.

Q. How old are you now?

A. Forty-two.

Q. Where have you followed the seas?

A. On the Atlantic, the Pacific and the Great Lakes.

Q. Steam and sail?

A. Steam and sail both.

Q. Were you Second on the motor tug Prosper in February, 1926?

A. No, the Tempest.

(Testimony of Alex Farmer.)

Q. And where were you then?

Q. I mean on the *Tempest*?

A. Yes, sir.

Q. On February 2nd were you bound on a voyage as Second on that vessel?

A. Yes.

Q. With tow?

A. Two scows of gravel.

Q. From where to where?

A. Devil's Head to Westlake.

Q. Where is Devil's Head?

A. Outside of Olympia.

Q. And where is Westlake?

A. Up in the canal, Lake Union.

Q. The Seattle Canal?

A. Seattle.

Q. What were your watches on that voyage?

A. 12 to 6.

Q. Coming from Olympia you came through the west passage?

A. The west pass, yes.

Q. Did you met with any casualty on the voyage?

A. A scow broke adrift; coupling lines broke.

Q. About what time and date?

A. 1:30 in the morning the 3rd of February, 1926.

(Testimony of Alex Farmer.)

A. Off of Blake Island.

Q. Off of Blake Island?

A. Yes, sir.

Q. That is just south of Wing Point, isn't it, what is called Wing Point on Bainbridge Island, a little south?

A. Down from Vashon Head.

MR. GORHAM: Just north of Vashon Head. It is not here on this chart.

THE COURT: You said 1:30 in the morning?

THE WITNESS: Yes, sir.

Q. What, if anything, did you do to correct the broken coupling?

A. A scow went on the beach and we had to take her off.

Q. The coupling what?

A. The coupling lines between the two scows.

Q. That had nothing to do with your tow line?

A. Nothing at all.

Q. Was the coupling repaired?

A. We had to put out one new coupling line.

Q. Did you proceed on your voyage after that?

A. Yes, sir.

Q. About how long were you on the beach there?

A. Until 3 o'clock in the morning.

(Testimony of Alex Farmer.)

Q. And then you left the beach at Blake Island on what side of Blake Island?

A. The south side.

Q. And came on to your destination?

A. Yes, sir.

Q. Entering the canal by way of Salmon Bay?

A. Yes, sir.

Q. What weather did you encounter crossing the Sound from Blake Island to Salmon Bay?

A. There was a heavy swell running all the way across.

Q. When did you arrive at Salmon Bay, if you remember?

A. I can't recollect the time when we got there.

Q. About how long would you be on that voyage approximately I mean?

A. About noon I guess.

Q. Leaving Blake Island at 3 o'clock you came right out into the Sound?

A. Right over towards Alki Point and then across the Bay.

Q. Now during that passage across there from 3 o'clock about how long did it take you to cross or how long would you be in the main body of water of Puget Sound there; you say until noon?

A. Yes; three hours I guess going across to Alki Point; that was the worst of it, going right across.

(Testimony of Alex Farmer.)

Q. Was there any wind blowing then?

A. It was not blowing near as hard as it was when the scow went on the beach, but there was a heavy swell running.

Q. What do you mean by a heavy swell?

A. Quite a sea.

Q. What was the tide?

A. Flood tide.

Q. What direction was the wind blowing?

A. Southerly wind.

Q. So your wind and tide were in opposite directions?

A. Yes, sir.

Q. What effect did that have on the sea?

A. Why, it raised the sea.

Q. What effect would the sea as it existed at the time, that is the sea at that time, what effect would that sea have upon a scow and tow?

A. You would have to put more pressure on the scow because she had that sea to buck.

Q. Running into the sea?

A. Coming into the sea.

Q. How do you remember this occasion?

A. Pardon.

Q. How do you remember that you ran into a storm on the night or the morning of the 3rd of February?

(Testimony of Alex Farmer.)

A. I have a pretty good memory or mind of things that have happened.

Q. You connect it up with the time that the barge went on the beach with a broken coupling?

A. Yes, sir.

Q. I show you a book and ask you what that is?

A. That is the log book of the *Tempest*.

Q. Now referring to the page numbered 30, printed number 30, what date is that?

A. February 2, 1926.

Q. And any other date on that page?

A. February 3rd and 4th.

Q. Now what is the item, entry on that log book February 3rd?

A. Wind increasing, barometer falling, February 2nd; February 3rd, No. 12 on the beach on the south side of Blake Island.

Q. What hour; any hour given there?

A. 1:30 A. M. broke coupling lines under way. Floated southerly. Wind rough. At 3 o'clock in the morning was under way.

Q. What is the next entry?

A. Arrived at Westlake Bunkers at 10 o'clock.

Q. Is that a true record?

A. That is the true record of the log book.

MR. COSGROVE: Did you make the entries?

THE WITNESS: Yes, sir, part of them.

(Testimony of Alex Farmer.)

MR. COSGROVE: Did you make those you read?

THE WITNESS: I made some write up and the Captain made the remainder there; while the scow was on the beach he entered that himself.

(Book handed to Mr. Cosgrove by Mr. Gorham.)

MR. COSGROVE: Are you through?

MR. GORHAM: Yes. I don't want to put that in evidence unless you want it. He read it.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. How far is it from Blake Island to say Monroe Point?

MR. GORHAM: Where is Monroe Point?

MR. COSGROVE: About opposite Meadow Point.

Q. Do you know where Monroe Point is?

A. Not by that name, no.

Q. Do you know the point across from Meadow Point near Port Madison?

A. Yes, I know where that point is.

Q. Referring to that point as Monroe Point?

A. I have no idea what the distance is across there.

Q. How far is Blake Island from Restoration Point?

A. It is quite a long ways from Restoration

(Testimony of Alex Farmer.)

Point. It don't lie the same way as Restoration Point at all, not Blake Island.

Q. Blake Island is to the south of Bainbridge Island, is it not?

A. Blake Island lays right out of the mouth of West Pass.

Q. And it is to the south of Bainbridge Island, is it not?

A. Pretty near in line with Blake Island after you pass Restoration Point.

Q. Suppose you were going from, say, Monroe Point to Blake Island, you would travel fairly south to Restoration Point and then what course would you take?

A. If I was going I would go up past Restoration Point to Blake Island.

Q. Yes?

A. Right up the shore all the way.

Q. What course would you take after you rounded Restoration Point?

A. Straight for the island.

Q. Give me your direction, your compass course?

A. South I guess. I don't know the true course from Restoration Point to Blake Island.

MR. COSGROVE: We will have to get another map.

(Testimony of Alex Farmer.)

Q. How far was it from Blake Island to the mouth of Salmon Bay?

A. That is a thing that I don't know either. I never seen logged the distance.

Q. Haven't you any idea at all?

A. No; I never worked a rule on it to find out the distance.

Q. What time did you get to the locks on the 3rd?

A. We got off of Blake Island at 3 o'clock in the morning and was at Westlake at 10; we must have got there about 5 anyway, 5 or 6 o'clock; it is owing to how long you wait at the locks before you get through.

Q. You got there at 5 or 6 o'clock in the morning?

A. We didn't get there at 5 o'clock. We couldn't come across that quick from Blake Island to the locks.

Q. Let us find out when you did get there?

A. I could not give you the exact time when we got there.

Q. How long did it take you to go across from Blake Island to the locks?

A. I could not give you the definite time when we got there; it took us a little over three hours.

Q. It took you a little over three hours?

(Testimony of Alex Farmer.)

A. Possibly it did.

Q. Well, might it have taken you two hours and a half?

A. No, we couldn't make it over in two hours.

Q. You couldn't make it over in two hours.

A. No.

Q. How long would it take you to go over in fair weather, smooth weather with that load?

A. Well, it might be an hour and three quarters.

Q. Was this barge that you had an empty barge?

A. No; we had two loaded barges.

Q. You only had one barge when you got off the island, didn't you?

A. We had two when we got off the island; we had one on the tow line and one on the island.

Q. Now I understand you that you came from Olympia with two barges?

A. Yes, sir.

Q. Did each of them have cars on them?

A. They had no cars on whatever; they had sand and gravel.

Q. Both of them loaded with sand and gravel?

A. Both of them.

Q. Fully loaded?

A. Fully loaded.

(Testimony of Alex Farmer.)

Q. And one of them got away and went on the island?

A. Yes, sir.

Q. And at this time you say there was some weather when it went on the island?

A. Some weather; it was blowing.

Q. All right, it was blowing then, and while it was blowing you were able to handle this barge that had not gone adrift and go ashore and get the one that was there, bring them back and put them together and head for Seattle at three o'clock; that is what I understand you did.

A. Yes, we took the scow off and headed for Seattle.

Q. What did you do with the scow that did not go adrift—

A. Kept her on the line.

Q. —when you were pulling the other one off the beach?

A. We nosed the boat into the beach and got the scow off that was on the beach. The whole scow was not on the beach.

Q. But you were able to take her off?

A. We were able; we took her off.

Q. And the other scow did not go on the beach?

A. No, because the tail scow broke adrift, that is the reason she went on the beach; the other scow was in contact on her tow line.

(Testimony of Alex Farmer.)

Q. How long have you been at sea?

A. Since I was nine years old.

Q. Then you are accustomed to hauling barges around?

A. No, I am not accustomed to hauling barges.

Q. How long have you been engaged in the hauling of barges on Puget Sound?

A. About five years off and on, logs and scows.

Q. And I suppose you have met all different kinds of weather during that time?

A. Yes.

Q. Is the weather the same as a rule in February as it is in July?

A. No.

Q. What is the difference?

A. Well, it is fine weather in July, where you don't look for such fine weather in February.

Q. What kind of weather do you look for in February?

A. Well, you look for squally weather, blows, in February.

Q. Do you mean that you are liable to have a squall at any time or a blow at any time?

A. Well, I guess we are as far as that is concerned, I guess it can blow any time.

Q. You expect them?

(Testimony of Alex Farmer.)

A. Oh, it don't usually happen in July as it does in February.

Q. You expect them in February on Puget Sound?

A. Yes, we look for them.

Q. You expect them around Blake Island?

A. We expect them anywhere.

Q. You would expect them off Meadow Point, wouldn't you, in February?

A. I guess it would strike Meadow Point like any other place I guess.

Q. In fact you would expect it at any time in February all the way from Point No Point to Blake Island or to Olympia, wouldn't you?

A. It would strike anywhere; it don't purposely go and strike one place.

Q. Would you say that that squall or that blow that you had on this particular night was unusual for that time of the year?

A. I would not say that it was unusual, no.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Mr. Farmer, you know how far it is from the dock to Alki Point, don't you, approximately?

A. Four miles.

Q. Is it further from Alki Point to Blake

(Testimony of Alex Farmer.)

Island than it is from the dock at Seattle to Alki Point?

A. From Blake Island?

Q. Yes, from Blake Island across to Alki, is that a longer distance than it is across the bay?

A. Across the bay?

Q. Yes, than it is across the bay.

A. Yes.

Q. Do you know how far it is across from Alki Point to West Point approximately?

A. No. We used to make it with the Tempest running light in about forty minutes; that is running light.

Q. From Alki Point to West Point?

A. No; to Vashon Head.

Q. From Vashon Head?

A. That is right on the end of Vashon Island?

Q. To Alki Point or West Point?

A. Alki Point.

Q. How fast would your vessel go?

A. She used to travel about nine to ten.

Q. Nine or ten?

A. Yes.

Q. And how fast was she going over the ground on this night when you had these scows in tow?

A. We could not travel full speed with her because of the swell.

Q. Irrespective of the motion of your engines how fast were you going over the ground?

A. About four miles; three or four.

Q. Were you going that fast?

A. I believe we was. We could not pull her full because we were scared of breaking things to pieces, scared we could not force the scows into the weather.

Q. In going into the locks you had to go around West Point, did you?

A. Yes, sir.

Q. Did you understand the question; did you mean to testify that it only took you two hours to go from Blake Island up to West Point and around into the locks?

A. Oh, no; I say it took that from Blake Island to Alki Point, then we went across the bay to the locks; we ran right across the face of the bay towards West Point and then into the locks.

MR. GORHAM: Yes. That is all.

(Witness excused.)

WILLIAM HOWARD KAYLOR, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Captain.

A. William Howard Kaylor.

(Testimony of William Howard Kaylor.)

Q. What is your age?

A. Forty-three.

Q. What is your occupation?

A. A mariner.

Q. How long have you been a mariner?

A. 1900.

Q. In what waters have you—

A. Well, Puget Sound and adjacent island waters and southeastern Alaska.

Q. In what capacity?

A. Both in the engine room and in the deck department.

Q. In what capacity in the deck department?

A. Well, a Master in charge of the vessels for the last several years.

Q. What character of vessels?

A. Well, both gas, diesel and steam.

Q. You have a Master's license?

A. Yes, sir.

Q. How long have you had a Master's license?

A. I have had a Master's for about seven or eight years for steam.

Q. Are you a Master of a vessel at the present time?

A. No, sir, not right at the present time.

Q. Were you Master of a vessel on Puget Sound in February, 1926?

(Testimony of William Howard Kaylor.)

A. Yes, sir.

Q. What vessel?

A. The Prosper.

Q. What was she?

A. She was a steam tug.

Q. Who are her owners?

A. The Bellingham Tug & Barge.

Q. Was she in the towing trade in February?

A. Yes, sir.

Q. Were you on her as Master on the morning of February 3rd, 1926?

A. Yes, sir.

Q. Have you the log book?

A. Yes, sir.

Q. Where is the Prosper now?

A. The Prosper is in Petersburg, in the Wrangel Narrows.

Q. In Alaska?

A. Yes, sir.

Q. You sent for her log book?

A. Yes, sir.

Q. Do you have it in your possession?

A. Yes, sir.

Q. Did you make the entries in that log book on February 3, 1926?

A. I made part of them and the mate made part of them.

(Testimony of William Howard Kaylor.)

Q. Turn to the entries on February 3, 1926.

MR. COSGROVE: Let us find out where the Prosper was at that time.

MR. GORHAM: All right. Probably that would indicate.

Q. Where was the Prosper?

A. We was enroute from Bellingham to Seattle with a barge in tow leaving Bellingham on the afternoon of the 2nd.

Q. A loaded barge?

A. No; an empty barge.

Q. About how long a barge was it, the size; what was the length of it?

A. Oh, this barge was about a hundred foot barge; it was a good sized barge.

Q. How long a tow line did you have out?

A. We had about four hundred feet in the first part of the trip; along about the middle of the watch, about 2 o'clock in the morning of the 3rd, we lengthened the tow line about three hundred feet more?

Q. Why?

A. On account of the weather.

THE COURT: When did you make that change?

THE WITNESS: Along about between 2 and 3 I think.

(Testimony of William Howard Kaylor.)

THE COURT: In the morning?

THE WITNESS: In the morning of the 3rd.

Q. What were your watches?

A. My watch was from 6 to 12; the mate was from 12 to 6. Of course in charge of the vessel the person is not always off of watch at any time; he is off watch, but still he is on watch.

Q. Were you off at any time between 12 and 3 or 4 o'clock on the 3rd?

A. I was up a couple of times in that second watch.

MR. COSGROVE: You mean A. M.?

MR. GORHAM: A. M.; in the morning.

A. (Continuing) Yes; yes; after I had retired at midnight I was up.

Q. Where were you about 12 o'clock on the morning of the 3rd—that is midnight of February 2nd?

A. Past Point Wilson off Port Townsend just about midnight.

Q. Coming south?

A. I know we changed watches there.

Q. Coming south?

A. Yes.

Q. What was the weather there?

A. The weather was a little southeast I judge, about twenty miles. It was not anything strong at that time.

(Testimony of William Howard Kaylor.)

Q. What was the sea?

A. There was no sea to speak of there at all.

Q. Now did the wind increase or decrease or remain steady from then on?

A. Well, it was steady for the next hour and then it increased. I know that the rumble of the wind past my window aroused me, that is the reason that I got up.

Q. How much did it increase?

A. Well, I would say pretty near double.

Q. And how about the sea?

A. The sea increased some too.

Q. What was the tide after leaving Wilson?

A. We had the short flood.

Q. Now I wish you would look at your log book. Have you the log book there of the Prosper?

A. Yes, sir.

Q. —and read the entries from that log book of February 2nd and February 3rd and indicate which are the entries in your handwriting as you read them.

MR. COSGROVE: I suggest that he read his own entries.

A. We left Bellingham, left Kane & Grinshaw's Dock, that is the waterway, in Bellingham.

Q. What date?

A. February 2nd.

(Testimony of William Howard Kaylor.)

Q. What hour?

A. At 3:40 P. M. 15:40 I have it entered. With a scow, the Drummond 33. The barometer read 29.55. We proceeded south. Do you want each point?

Q. Yes, just give us the record; that is the best way.

A. At 15:43 municipal dock. Do you want the courses too?

Q. No; I am not—

A. 16:6 at the bell buoy. It was calm with a flood tide. At 17:25 Point Williams.

Q. That is the 17th hour, 25 minutes after the 17th hour?

A. Yes, 5:25 in the afternoon. A light north-west breeze. 17:57 Huckleberry. 18:05 Guemes Point; 18:25 Anacortes. 18:58 Shannon Point. 19:18 off Burrows Light. Barometer 29.40, with a strong southeast wind.

MR. COSGROVE: Where was that point?

THE WITNESS: Burrows Island.

MR. COSGROVE: Where is Burrows Island?

THE WITNESS: It is in Rosario Straits, about four miles the other side of Deception Pass. I was undecided at this time whether to go inside or out, but when I proceeded past there the weather was—there was no sea, so I went outside of Whidby

(Testimony of William Howard Kaylor.)

Island rather than go inside. It is a little bit shorter outside. I figured I could catch a fair tide from Point Partridge to Seattle. I figured on making Seattle about six in the morning. At 22 Point Partridge and then at 19 minutes past twelve Point—This is on February 3rd, the morning of the 3rd, the mate went on watch. Here this is his handwriting.—Point Wilson. The barometer—the tide was slack. The barometer reads 29.56. Strong southeast wind. 45 Admiralty Head—that is 45 minutes past 12. 1:23 Marrowstone Light.

MR. COSGROVE: What was that last number?

A. 1:23 in the morning Marrowstone Light with a flood tide. Barometer 29.57. Very strong southeast. 3:42 Bush Point.

Q. Where is Bush Point?

A. Bush Point is on Whidby Island about half way between Marrowstone Point and Point No Point; perhaps a little closer to No Point. The barometer reads 29.56.

Q. Point No Point is on the west side of the Sound?

A. Point No Point, yes, you pass on starboard. Barometer reads 29.56 at 3:42, southeast gale and rain.

Q. And where were you then?

(Testimony of William Howard Kaylor.)

A. At Bush Point. 5:07 Point No Point, barometer reading the same, the weather the same except for squalls. The weather was beginning to come in puffs at this time. Then the next is my handwriting at 6:10 Apple Cove Point. 7:45 West Point. 8:30 Duwamish Head.

Q. That is all; that is enough.

A. And 9:10 West Waterway.

Q. You say you were up twice in the night after you went below?

A. Yes, I got up and looked out the window and once I went up and slipped on my shoes and went on the after deck and looked around and they paid out the tow line.

Q. About what time was it those two times you were up?

A. It was right off Bush Point one time.

Q. And how was the weather and sea and wind conditions that you observed as compared with the entries made by the mate in the log at that time?

A. Well, I would have made them the same.

Q. What was the second time you were up; what time was the second time you were up?

A. I was up a little before that; I judge about 2 o'clock, before I got to Bush Point, and then off Bush Point. After that everything was all right and I didn't come up again until about 5:30 at the breakfast bell.

(Testimony of William Howard Kaylor.)

Q. How far is Bush Point from Meadow Point approximately?

A. Well, I would judge it is eighteen to twenty miles. Now that is just an estimate. I would not—

Q. So at Bush Point at three—

A. —forty-two.

Q. —3:42 it was—

A. Right here at Bush Point 3:42.

Q. —a southeast gale and rain. In your experience as a Master mariner in waters of Puget Sound would that condition prevail abreast of Meadow Point at that hour?

A. Yes.

Q. That wind, that velocity, and the sea as you saw it at Bush Point, what would be the—

A. I would figure that off Meadow Point it would be a heavy sea.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. How old is this Prosper?

A. Built in 1900, I think.

Q. And you say this was a lage barge you had?

A. I think that that is about a 500 ton barge. Of course that can be easily ascertained by the records.

Q. You have done considerable towing of barges, have you, Captain?

(Testimony of William Howard Kaylor.)

A. Yes, I have been with the company now for the last eight years in the general towing business and my first experience was in the cannery business with scows.

Q. You were up on the morning of the 3rd about 2 o'clock first and how long did you stay up then?

A. I didn't stay up long. I went out and they payed out some of the line, you see, and everything was all right. We had a light barge and a good able tug and so I lay down again.

Q. You didn't consider anything unusual there that would keep you up?

A. Not for us, no.

Q. And when you got up again at 3:42 you evidently did not consider it unusual for you because you returned to your bunk?

A. Yes. No; I figured that it was all safe for us, a good able tug and a light scow and a good tow line.

Q. You expect different weather, do you, in February from what you expect in July, Captain?

A. The weather as a rule is a little more unsettled and it seems as though in the winter time that the same velocity of wind will have more disturbance in the water than it will in the summer time. Now that may be imagination and it may not.

(Testimony of William Howard Kaylor.)

Q. You mean it will kick up more of a sea?

A. Yes.

Q. Make more of a swell?

A. Yes; it seems to have more force; the same velocity of wind.

Q. Now do you consider that this weather that you encountered on this voyage was unusual for that time of year?

A. The only unusual part of it was it came up and was of short duration. It was not bad before. And then it went down shortly after and when we came into Seattle the weather was fine, there was no sea.

Q. What I mean is, is what you encountered something to be unlooked for at that time of the year?

A. Well, I really did not expect it that night.

Q. Well, you are not quite answering my question. Is it—

A. Well, no. I think I understand what you mean, that it was no heavier sea than what a person would naturally expect at that time of year?

Q. That is what I mean.

A. No.

Q. Was the wind anything extraordinary for that time of the year?

A. Well, I have seen it blow that hard a good many times.

(Testimony of William Howard Kaylor.)

Q. At that time of the year?

A. Yes.

Q. When you take a barge out in February do you expect to meet with all kinds of weather?

A. A person has to take it as it comes.

Q. And you would not be surprised in February if you encountered this kind of weather and this kind of sea, would you?

A. No.

Q. You came through all right, did you not?

A. Oh, yes.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. What is the tonnage of the Prosper?

A. One hundred and eleven I think.

Q. Are you familiar with the Ketchikan II?

A. Yes, I have seen her.

Q. How does she compare in tonnage with the Ketchikan II approximately?

A. Well, she is a good deal more than twice the size I would judge.

Q. How?

A. I would think that she would be a little more than twice the size.

MR. COSGROVE: Twice the size.

THE COURT: Which way around is that?

(Testimony of William Howard Kaylor.)

THE WITNESS: What is that, Judge?

THE COURT: That is the Prosper is twice the size of the Ketchikan?

THE WITNESS: Yes, I think she is a little more then twice the size.

Q. And you were coming up with a light scow?

A. Yes.

Q. There is some difference in towing a light scow and a loaded scow in a storm, isn't there?

A. Yes.

Q. And in favor of the light scow as against the loaded scow, isn't it?

A. Well, yes; you havent that load there.

Q. Now when you say it was blowing a south-east gale at Bush Point what velocity of wind would that be; what would be a gale?

A. That would be in the neighborhood of forty miles.

MR. GORHAM: That is all.

RE-CROSS EXAMINATION.

BY MR. COSGROVE:

Q. How would you estimate forty miles, Captain?

A. The only way we have of estimating that is in comparison and then get the weather reports. When we say forty miles that is only an estimate in our mind; we have no way of telling whether it is forty miles or whether it is fifty miles.

(Testimony of William Howard Kaylor.)

Q. Now in your experience would you say that if the wind at any given place on the Sound, say off Bush Point, should be, say, forty miles, would it follow that ten or fifteen miles away the wind would be the same?

A. No, sir.

Q. It does not follow.

A. You can't—I have seen it change considerably, but in this location the wind was coming from pretty near the same direction as off Meadow Point.

Q. Bush Point is beyond Point No Point, is it not?

A. Bush Point is right here. (Indicating.)

Q. And it is considerably to the west of Meadow Point, is it not?

A. Yes; that wind lay in kind of like this, you see, direction, we were facing pretty nearly into it and I would estimate for that reason that they were getting a pretty good sea in here.

MR. GORHAM: At Meadow Point?

THE WITNESS: Yes, off Meadow Point.

Q. That is your guess, isn't it?

A. That is my judgment, yes.

Q. You were twenty miles away from Meadow Point?

A. Yes; at 3:42 we was off Bush Point.

(Testimony of William Howard Kaylor.)

Q. Will you make another estimate of your distance from—

A. This gives it two knots right here; that is two, four, six, eight, ten, twelve, that is fourteen miles, fourteen knots.

MR. GORHAM: From where to where?

A. From Meadow Point to Bush Point. Now here this is not knots here. This is your standard knots or miles, that is your scale drawn there, right here. You see this gives it here to one, here is two, there is two right there, two, four, six, eight, ten, twelve, fourteen, sixteen, seventeen, nineteen knots, it is nineteen knots from Meadow Point to Bush Point.

Q. Yes, in an air line.

A. No; that is the course. I didn't measure it directly over it. That is by water.

Q. You have been at sea some time and have you observed winds in a distance but not yet touching you?

A. Yes, sir.

Q. And how close could you see the winds that were roughing the water and not yet touching you?

A. Well, the wind of course would touch us, but at sea five or ten miles away from us we could see or we could run into heavier sea than at this other point.

(Testimony of William Howard Kaylor.)

Q. Conditions might easily be different in five to ten miles apart—

A. Yes.

Q. —as far as the sea is concerned?

A. Yes.

Q. That same might be true also of the velocity and violence, strength of the wind?

A. Yes.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. But if the wind was blowing a southeast gale at Bush Point you would naturally expect that the same velocity obtained twenty miles south of Bush Point, the place from which the wind was blowing?

A. Yes.

MR. GORHAM: That is all.

A. (Continuing) We was facing nearly into the wind.

RE-CROSS EXAMINATION.

BY MR. COSGROVE:

Q. How would you know it was blowing that twenty miles away? You could not be both places at once.

A. I wouldn't know it only just from general experience and judgment.

(Testimony of William Howard Kaylor.)

Q. What kind of experience have you had which would demonstrate that if you were off Bush Point and the wind was blowing forty miles an hour that at Meadow Point it would be blowing the same velocity?

A. Well, of course, I could not say that it was, but in my judgment I would think that it was.

Q. I say what experience have you had that would demonstrate that it was?

A. Well, just my general towing experience and in traveling from one place to the other and noticing the wind in our travels.

Q. Your guess might be wrong, might it not?

A. Oh, I might be wrong, yes.

MR. COSGROVE: Let us put this map in evidence here so that the Court can find out where Bush Point is. Is there any objection?

MR. GORHAM: No objection.

THE COURT: Admitted.

THE CLERK: That will be Respondent's "A-4."

(Map referred to admitted in evidence and marked Respondent's Exhibit "A-4.")

MR. COSGROVE: Will you take a red pencil here and mark Bush Point so that the Judge can see it from where he sits; make a big "X" there.

(Witness marking.)

(Testimony of William Howard Kaylor.)

MR. COSGROVE: Now will you make a big "O" at Meadow Point so the Court can see the two on that chart?

(Witness marking.)

Q. The Sound at Bush Point seems to run north and south, does it not?

THE COURT: Is that Bush Point opposite some island?

THE WITNESS: Bush Point is on Whidby Island.

THE COURT: Meadow Point is still further up?

THE WITNESS: Yes.

MR. GORHAM: Here is Port Townsend, if the Court please.

THE COURT: All right.

Q. The Sound runs fairly north and south off Meadow Point, does it not, true north and south?

A. Yes.

Q. The channel?

A. The true course, of course, our compass, magnetic—

Q. Then when you get up to Whidby Island the channel swings off to the west, does it not?

A. Yes.

Q. When you get to Bush Point that is considerably to the West of Meadow Point, is it not?

A. Bush Point is west of Meadow Point.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

J. C. BROWNFIELD, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your full name, Captain?

A. J. C. Brownfield.

Q. Your occupation?

A. Manager of the Washington Tug & Barge Company.

Q. Are you a Master mariner?

A. Yes, sir.

Q. How long have you been a Master mariner?

A. Since 1904.

Q. And you have a Master's papers?

A. Yes, sir.

Q. What tonnage?

A. Unlimited.

Q. What waters?

A. Any ocean.

Q. Sail and steam?

A. No; steam only.

Q. How long have you been in the tug boat business?

(Testimony of J. C. Brownfield.)

A. Oh, about fifteen years.

Q. Have you ever been Master of tugs?

A. Yes, sir.

Q. What size tugs, tonnage?

A. I have been from four or five tons up to the largest.

Q. On Puget Sound?

A. On the coast.

Q. What would be the tonnage of the largest, oh, approximately?

A. Six hundred tons.

Q. How long were you Master of tugs towing on Puget Sound?

A. Oh, probably six years.

Q. In all waters of Puget Sound?

A. Yes, sir, Puget Sound and Alaska and along the coast.

Q. Are you familiar with the tug Ketchikan; have you seen her?

A. In a general way, yes.

Q. You have seen the craft?

A. Yes, I have seen the craft.

Q. A motor tug?

A. Yes.

Q. You know the Chesley No. 1 car barge; you have seen it?

A. I know the car barge that he has.

(Testimony of J. C. Brownfield.)

Q. The ninety-foot car barge?

A. Yes.

Q. If the Ketchikan II was towing the Chesley car barge No. 1 laden with five cars and a locomotive crane on its own wheels with four of the railway cars loaded with contractor's camp equipment for cargo, crossing the Sound from President Point toward Meadow Point in a storm with a sea running, what would be the action of the wind and waves on the tow, such a tow in such conditions?

MR. COSGROVE: I object unless there be a better definition of the term "storm." That is a little too broad and too indefinite.

THE COURT: Objection overruled.

A. Well, that would depend of course largely on the force of the wind and sea.

Q. Yes. Supposing you had a wind blowing, assuming that the wind was southeast or southerly, at the hour ending at eleven o'clock p. m. on February 2, 1926, at 18 miles; the hour ending at midnight, 13 miles; the hour ending at 1 a. m. on the morning of the 3rd of February, 19 miles; the hour ending at 2 a. m., 28 miles; the hour ending at 3 a. m., 26 miles; the hour ending at 4 a. m., 22 miles, and assuming that for five minutes beginning at 1:35 a. m. of the 3rd the wind blew at the rate of

(Testimony of J. C. Brownfield.)

36 miles and in the five minutes beginning at 2:10 a. m. of the 3rd at the rate of 34 miles an hour.

MR. COSGROVE: I object to the question for the reason that there is no testimony that there was any such set of facts affecting this vessel and there is no testimony that that was the wind at any time or point in her movement.

THE COURT: Objection overruled.

MR. COSGROVE: An exception.

THE COURT: Allowed.

A. Where was this data gathered?

Q. This data from the anemometer on the top of the Hogue Building at Seattle.

A. Well, the weather condition might be considerably different out in that locality.

Q. Assuming that the weather conditions were the same in that locality, what would be the action of that wind and sea or what would be the action of the wind and the sea and the force of the wind upon the tow?

A. Do you know what speed the tug was making?

Q. No, I do not. The tide was flooding about an hour flood.

THE COURT: Didn't he testify it would make one mile over the ground?

MR. GORHAM: I have forgotten, if the Court

(Testimony of J. C. Brownfield.)

please, what the testimony was in respect to that. I don't think the witness testified. Mr. Mortensen, did you testify the speed you went into that storm from President Point, how fast you were traveling over the land?

MR. MORTENSEN: A mile an hour approximately.

MR. GORHAM: Approximately a mile an hour.

MR. COSGROVE: Let us get that witness back here again if you are going to interrogate him.

MR. GORHAM: Well, I simply asked him the question because the Court inquired, that was all.

THE COURT: That is the way I remembered his testimony.

MR. GORHAM: Yes, I had forgotten it, if the Court please.

A. I would think under those conditions that that barge, loaded in that manner, in the tow of that tug, would have a tendency to head up in the wind and then fall off in the trough of the sea and then probably go along for a while in that condition and eventually sheer and then come up into the wind and fall off in the trough of the sea on the other side.

Q. With a tow line four hundred feet long the same condition it would be?

A. Oh, yes, four or five hundred feet.

(Testimony of J. C. Brownfield.)

MR. GORHAM: I forgot to put that in.

Q. Now in towing with a tow line under those conditions your tow would not follow immediately the tug along a given line?

A. No, if the tug did not have any more power than to pull her through the water at that rate of speed, I would say that the barge would sheer off first on one side and then on the other.

Q. In sheering off a line drawn fore and aft through the center of the barge would not be along a line extended through the center of the tug fore and aft or parallel to the line of the center of the tug fore and aft, would it?

A. Oh, no; sometimes they go off to right angles if a squall strikes them, an extra hard squall.

Q. And if you have got those conditions of wind and sea and of tug and tow what effect will the sheering of the barge have upon the cargo, if any?

A. Pardon?

Q. What effect will that sheering have upon the cargo, if any, on the barge?

A. What effect will the sheering of the barge have upon the tug?

Q. No; what effect will the sheering of the barge have upon the cargo, if any?

A. Well, when the barge is heading up into

(Testimony of J. C. Brownfield.)

the sea, going at that low rate of speed, in that locality, it would be practically no effect at all on the cargo on the barge because the barge would be comparatively steady.

Q. Just a moment. Let us put into our assumption or hypothetical question the fact that the barge was a foot down by the stern.

A. Well, the fact that she would be down by the stern and up by the bow would in a heavy wind storm at sea and going at that rate of speed would accentuate her liability to sheer into the trough of the sea. Had she been loaded down by the head, well down by the head, then it would have been a much easier job to have held her up into the sea, and of course when the barge falls off in the trough of the sea then the beam of the barge is in such small proportion to the length of the barge that a comparatively small sea will cause them to roll.

Q. This barge was ninety feet long and thirty-six feet beam; she would roll in that kind of a sea under that force of wind?

A. Yes, I would think so; that is, she probably would not do much rolling to the weather because the cars on the barge, that top weight, would act a good deal like the sails on a ship, she would probably come up to about an upright position and then roll down to leeward.

MR. GORHAM: I think that is all.

(Testimony of J. C. Brownfield.)

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. I think you just answered one of Mr. Gorham's latest questions relating to the cargo by saying that this sheering ought not to have had any effect on the cargo, if I understood you correctly.

A. Will you speak a little louder, please?

Q. Mr. Gorham asked you some questions about the effect of this sheering on the cargo and, if I understood you correctly, you said that that ought not to make any difference.

MR. GORHAM: No, I didn't so understand him.

A. As long as the barge is heading up into the sea, she is ninety feet long and going at that slow rate of speed, she would be steady, would be comparatively steady; when she fell off into the trough of the sea of course she would roll.

Q. Now what course did you have in mind when you were answering these questions; what course was this tow and tug on?

A. I understood that they were coming up the Sound, coming from President Point to Meadow Point.

Q. Well, your understanding is that they were then on a course from President Point to Meadow Point?

(Testimony of J. C. Brownfield.)

A. Yes, I understood the counsel to state that.

Q. That would be a course crosswise of the Sound, would it not, Captain?

A. It would be a diagonal course across there, yes.

Q. And such a course would be diagonal to a southerly wind, would it not?

A. Yes.

Q. But let us suppose that the course is southerly instead of southeasterly or diagonal and the wind is from the south?

A. It would not alter the situation very much, as I see it, because that barge was astern of the tug like a kite on a string, it is blowing down to leeward and it would not make very much difference what course the tug was on as long as the tug was heading up to windward of the barge; the barge would drift down to leeward of the tug boat no difference what course the tug was on.

Q. I think you said something about the barge sheering from side to side and coming up into the wind and by that you mean meeting the wind as it comes forward?

A. Yes, that would be meeting the wind.

Q. And then falling off into the trough of the sea, I believe that is what you said, wasn't it; it

(Testimony of J. C. Brownfield.)

would be alternating, coming up and falling off into the trough?

A. Yes, it would fall off into the trough of the sea until such time as the hawser set tight and broke that sheer then she would come up to the wind and in all probability fall off on the other side or she might not quite make it up in the wind and fall back off on the same side again.

THE COURT: There has been evidence as to having a bridle on the front of the barge. Would that in any way tend to counteract that?

THE WITNESS: That would not overcome that tendency under those weather conditions. Of course if the tug and barge were moving through the water at a fair rate of speed when the tug has sufficient power it exercises sufficient power on the barge to overcome the effect of the wind. The bridle then of course functions perfectly, but under those conditions, when you are almost stopped, the bridle will not hold her steady.

Q. Suppose we change the hypothetical question a little and make the movement of the tug and tow over the ground two miles instead of one.

A. Pardon?

Q. Suppose we change this hypothetical question of Mr. Gorham's, showing the speed over the ground from one mile to two miles—we will just

(Testimony of J. C. Brownfield.)

double it—what would your answer be then?

A. The more speed you had, why, of course, the greater tendency of the barge to tow straight.

Q. Well, if this tug and tow were meeting this weather going over the ground at the rate of two miles, would you feel that there was any distinct liability to sheer to one side or the other?

A. Well, two miles is not very fast, you know. That is going pretty—

Q. You really are not answering my question yet. Do you think there would be any distinct liability to sheer from side to side at two miles?

A. Oh, I think so, yes, there would be more or less sheering at two miles an hour.

Q. Well, would there be any particular difference between two miles and one mile?

A. Oh, yes, yes. One mile you would get more sheering and she would hold her sheer longer at one mile than she would at two.

Q. There would be a distinct difference between two and one, would there?

A. Oh, there would be some little difference.

Q. Do you expect in February, Captain, any different weather from what you get in July?

A. Oh, yes.

Q. In what respect is it different?

MR. GORHAM: This is not proper cross

(Testimony of J. C. Brownfield.)

examination, if the Court please. We object to it on that ground.

THE COURT: Objection overruled.

A. In the month of February you have more wind and more rain, more severe weather.

Q. With reference now to Puget Sound, particularly from Point No Point down to Meadow Point?

A. The weather conditions of course would be the same with regard to that.

Q. You would expect more wind and more what?

A. There would be more wind and more rain in the month of February than there would be in the month of July.

Q. Do you expect any squally weather in February?

A. Oh, yes, very liable to get it.

Q. What are you liable to get by way of bad weather in February in that vicinity?

A. Liable to get anything from a dead calm to a whole gale.

Q. What would a whole gale be?

A. Oh, it would be a storm probably fifty to sixty miles an hour.

Q. Then would you say that this wind which counsel named in the hypothetical question was

(Testimony of J. C. Brownfield.)

unusual for the month of February in that particular portion of Puget Sound?

A. Well, of course, we don't have that kind of weather continuously, but then you could reasonably expect such a wind.

Q. You could reasonably expect such a wind in the month of February?

A. Yes.

Q. And could you reasonably expect that kind of a sea in the month of February at that vicinity?

A. Oh, yes, the sea would naturally follow the wind.

Q. Now, Captain, since you quite clearly are familiar with Puget Sound and know the winds and waves, I want to ask you a question. We will change the hypothetical question a little bit and we will suppose that in this vicinity there was a heavy swell running and a strong southerly wind prevailing, the sea being smooth, would you consider that—

A. State that first part again.

Q. The tide is flooding, a heavy swell running, strong southerly wind prevailing and the sea smooth, what effect, if any, would that have upon the barge?

A. How could you have a strong southerly wind and a heavy swell and a smooth sea?

Q. You don't think it could happen?

A. It seems to me that is rather a contradictory statement.

(Testimony of J. C. Brownfield.)

Q. You can't picture that from your experience?

A. No, not unless it was covered with oil.

Q. If the sea is smooth, Captain, there is no trough to fall into, is there?

A. No.

Q. Not even with a heavy swell running there is no trough, is there?

A. Well, if there is a heavy swell there is a trough, surely.

THE COURT: The question is a trough to fall into.

Q. I am talking about a trough to fall into. You spoke of a trough a while ago.

A. If there is a heavy swell, of course, there is the trough of the swell.

Q. But that was not the trough you referred to a bit ago in answer to Mr. Gorham's question; you were talking of a different trough, weren't you?

A. You take a heavy swell and a sea and a wind—with a wind I think would be the same thing. I could not imagine—

Q. Do you get a swell simultaneously with a wind?

A. Yes, you get it very quickly on the inland waters; the wind comes and the sea comes up; when the wind goes down the sea generally follows.

Q. The sea follows wind, does it not?

(Testimony of J. C. Brownfield.)

A. Yes, the sea follows the wind.

Q. And it does not come up at the same time?

A. On inland waters it starts practically at the same time; it is not required to blow very long until you have a sea.

Q. Counsel in his hypothetical question referred to a five minute wind out at this particular place off Meadow Point at thirty-six miles an hour; would you consider that a wind, a five minute breeze at thirty-six miles an hour?

A. Well, I would consider that—what was the wind previous to that five minutes?

Q. I don't know. It was under thirty miles.

A. Of course that would be regarded as a squall.

Q. That is a sort of a puff, is it not?

A. It is a squall, it would be designated as I think.

Q. A squall might happen at one point on the Sound and not affect another point ten miles away, might it not?

A. Yes, that is true.

Q. So that if you had a squall at any given point it would not follow that it was at any other point ten miles away?

A. No, no; the only thing is that you generally get more wind out on the water, out on the channels of the Sound, than you do at a weather station;

(Testimony of J. C. Brownfield.)

you are more liable to get squalls out there than you are at the weather station in Seattle.

Q. The weather down on the water would be quite different or quite less, would it not, than the weather up 250 feet above Second Avenue and Cherry?

A. Well, my experience with the weather in that locality has been that whenever it is blowing in around the city and around the bay it is much stronger outside, you get out around West Point and you have got a breeze and got a sea running; you get in the bay, of course, you don't have the sea; you would not expect that, but very often you get very little wind. I have come up outside, come up the Sound, come into the bay and come into the office and reported a heavy gale of wind all the way up the Sound and the fellows in the office would hardly believe me, they would say, "It has been calm here; we haven't had any wind here to bother us."

Q. Well, you have seen the reverse of that, too, haven't you, Captain?

A. Oh, when it is the reverse it is generally rain squalls or something like that around the city, but any general wind my experience has been that it is more severe out in the main channels of the Sound than it is around the bay.

(Testimony of J. C. Brownfield.)

Q. But you have seen it the reverse?

A. Yes, I have seen squalls around the city and then get outside and it would be comparatively calm, but that is not the rule.

Q. Suppose you had a wind off Apple Cove Point of thirty, thirty-five or forty miles an hour from the south running for an hour, say, blowing for an hour, how soon would the sea die down to smooth water?

A. If it would just fall flat calm do you mean?

Q. How soon would it go down to a smooth sea?

A. If the wind would just let go, just quit blowing, I imagine that probably within a matter of thirty or forty minutes there would be very little sea left.

Q. Say you had a wind running for two hours, such as that, blowing straight up the Sound or down the Sound?

A. That same condition holds good, if the wind would fall flat calm the sea would very quickly go down.

Q. But if it did not fall flat; if it just broke off gently?

A. Then, of course, the sea would run longer.

Q. The sea will run after the wind, will it not?

A. What is that?

(Testimony of J. C. Brownfield.)

Q. The sea will continue to run after the wind is gone, will it not?

A. Yes, it will run for a certain length of time, but not very long on inland waters. Outside, out in the ocean it will last a long time, sometimes for a couple of days after a severe storm, but on inland water that is not the case, the sea will come up quickly with the wind and it will calm down quickly after the wind is gone.

Q. You don't call a ten mile breeze a wind, do you?

A. A ten mile breeze?

Q. Yes.

A. No; that is just a moderate breeze.

Q. Would that ten mile breeze make any sea?

A. Not much.

Q. Would it make any?

A. Oh, a little, a little ripple.

Q. Suppose the breeze had been thirty, thirty-five or forty miles for a couple of hours, then it would change off to ten miles an hour, would you say that that would produce a smooth sea?

A. Yes, it would! the sea would eventually go down, it would soon go down.

Q. Well, as long as it was still going ten miles an hour would it be a smooth sea?

A. Well, of course it would reduce down to

(Testimony of J. C. Brownfield.)

whatever a ten miles breeze would hold. A ten mile wind would not make much sea, you know.

Q. Well, would it be a smooth sea?

A. Oh, practically so. Of course it is a relative proposition. If you were out there in a canoe it would mean one thing and if you were out there in a large vessel it would mean something else.

Q. If there was a swell running would there be a smooth sea?

A. Well, I don't quite get that. As I visualize a smooth sea it is something where the water is on a perfect level. If there is movement there, regardless of whether it is a swell or a sea, it is not smooth.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. I understand, Captain, you to say from your experience that the wind blows stronger through the courses of the Sound than it does over the land.

A. Yes, sir, that has been my experience.

Q. Do you draw from that experience that the storm center follows the channel of the Sound as it is made by the contour of the land on either side?

A. Yes, that seems to be the rule. You not only find it on the Sound here but wherever you go. Take, for instance, the Columbia River, the westerly winds will blow a gale up the Columbia River and

you get a few miles away from the river and you have but very little wind.

MR. GORHAM: I think that is all.

MR. COSGROVE: That is all.

(Witness excused.)

ARTHUR W. NELSON, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Captain.

A. Arthur W. Nelson.

Q. Speak loud, Captain, so we can all hear you.

What is your occupation?

A. Operator of a tow boat.

Q. On Puget Sound?

A. On Puget Sound.

Q. How long have you followed the sea?

A. Thirty-one years.

Q. What waters?

A. Atlantic and the Pacific.

Q. What vessels; sail and steam?

A. Sail and steam, gas and diesel.

Q. Have you sailed on the seas?

A. Yes, sir.

Q. As a sailor?

A. A sailor.

(Testimony of Arthur W. Nelson.)

Q. How long have you operated gas boats on Puget Sound?

A. The first of 1906.

Q. Were those gas boats tug boats?

A. No; that happened to be a pure seine fishing boat.

Q. How long have you operated, if at all, what you call motor tug boats?

A. 1911.

Q. Since 1911 on the waters of Puget Sound?

A. Yes, sir.

Q. Towing what?

A. Towing barges and logs.

Q. Were you the operator of the motor tug boat Ketchikan II on February 2nd and 3rd, 1926?

A. Yse.

Q. When had you joined that vessel as its operator?

A. About—I first went aboard the vessel in July, 1923. I think it was. Captain Croft was the owner of the vessel then.

Q. How is that?

A. Captain Croft was the owner of the vessel then.

Q. Were you the operator of the Ketchikan II with the Chesley No. 1 car barge laden with railway

(Testimony of Arthur W. Nelson.)

cars and a locomotive crane in tow from Potlatch to Seattle on February 2nd and 3rd?

A. Yes.

Q. What were your watches on that voyage?

A. From 6 to 12, but as an operator subject to call at any time in any unusual conditions.

Q. What time did you leave Potlatch on that voyage?

A. I think it was somewhere around 6 or 6:30 or 5:30. I forgot now exactly.

Q. In the morning?

A. In the morning.

Q. Of the 2nd?

A. Yes.

Q. And where had you arrived en route at midnight on the 2nd?

A. Oh, I should judge about in the neighborhood of a half a mile northwest of Apple Cove Point.

Q. You went off watch then?

A. Yes.

Q. What was the weather at 12 o'clock when you went below at midnight of the 2nd?

A. Oh, I would judge it was nothing to be alarmed over, a breeze about, oh, from eight to twelve or fourteen miles, between there.

Q. Did you go immediately below at midnight?

(Testimony of Arthur W. Nelson.)

A. Well, I usually about ten to fifteen minutes after twelve.

Q. When did you come on deck again that morning?

A. That morning about it must have been in the neighborhood of pretty close to two o'clock or somewhere around there.

Q. What called you at two o'clock?

A. It got rough. The boat began to—the tug began to rock.

Q. Did anybody call you or did you come up on your own initiative?

A. I as a rule get up myself, but if I ain't mistaken they called me at this time.

MR. COSGROVE: I didn't get the answer to that. What was that, Mr. Reporter?

(Answer read.)

Q. Did you go on deck?

A. Yes.

Q. What was the weather condition then?

A. Well, it picked up a heavy wind.

Q. And what was the sea condition?

A. The sea was—well, the sea was picking up. There was a little sea before from this breeze what we had, but it began to get heavy.

Q. How long did you remain up at 2 o'clock?

A. I was up for about an hour.

(Testimony of Arthur W. Nelson.)

Q. Did the wind and sea increase or remain steady or decrease in force and velocity?

A. Before I went—laid down again the wind decreased.

THE COURT: Before you laid down it began to fall?

THE WITNESS: Yes.

Q. Began to increase or decrease?

A. Decrease.

Q. That is before 3 o'clock?

A. Yes.

Q. You went below again at 3 o'clock?

A. Yes, about that.

Q. How about the sea?

A. Well, there was quite a swell.

Q. How?

A. Quite a swell rolling, big swell.

Q. Did that increase or decrease?

A. It seemed like the tide was flooding, increased slow.

Q. The tide was flooding, was it?

A. Yes.

Q. Did you look back at your tow?

A. Yes.

Q. How was the tow riding?

A. Normally the same as it was when I left the canal.

(Testimony of Arthur W. Nelson.)

MR. COSGROVE: What time do you refer to?

MR. GORHAM: When he was up at 2 o'clock.

Q. That is, during that hour how many times did you look after and observe the tow?

A. I looked quite often during the wind.

Q. Before you went below did you see any change in the condition of the tow riding—

A. No.

Q. —from normal?

A. No.

Q. When did you next come on deck?

A. About, oh, it must have been between 3:30 and 3:45.

Q. What brought you on deck—

A. Between 3:30 and 4 o'clock.

Q. What brought you on deck that time?

A. My Second lifted the governor, took the power off the engine, and I jumped out from my bunk to see what he was doing.

Q. You could feel something?

A. No.

Q. Or hear something?

A. No.

Q. How—

A. By the motion of the engine.

Q. Did the motion of the engine change?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. Slowed down?

A. When he lifted the governor, yes, it slowed down.

Q. That aroused you?

A. Yes.

Q. Did you come up then?

A. Yes.

Q. Where did you go; up on deck?

A. Up on deck, yes.

Q. What did you find when you went on deck?

A. The first thing Mr. Mortensen said, "I can see no lights," and I looked back, I saw a dark shadow on the water and I said, "Well, it seems like the scow is standing on end."

Q. Then tell us just what you saw there; continue.

A. Well, I didn't see nothing else at that time.

Q. Did she resume her normal position in the water?

A. Before that?

Q. No; after you saw her standing on end. You say you saw her standing on end.

A. Yes. I didn't see no light either. I just saw a dark shadow like.

Q. When you saw the scow she was standing on end. Did she continue to stand on end?

A. No.

(Testimony of Arthur W. Nelson.)

Q. After you saw her standing on end what did you see?

A. Nothing on the scow.

Q. She had spilled her load?

A. Yes.

Q. You continued—

A. I took my position as close as I could observe.

Q. What was your position then?

A. I was I would judge a mile and a quarter to a mile and a half northwest of Meadow Point.

Q. How could you determine that position?

A. Just by judgment and I saw the Alki light just in line with West Point Bluff.

THE COURT: We will interrupt the trial and will resume again at 2 o'clock. The Court will be at recess until 2 o'clock.

Further proceedings continued to 2 o'clock p. m., same day.

December 28, 1927, 2 o'clock p. m.

All present.

Proceedings resumed as follows:

ARTHUR W. NELSON, a witness on behalf of the Libellants, resuming the stand, testified as follows:

MR. GORHAM: Read the last two questions and answers.

(Testimony of Arthur W. Nelson.)

(Questions and answers read.)

MR. GORHAM: That is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Do you hold a license from the Steamboat Inspection Service?

A. No.

Q. Have you ever had one?

A. No.

MR. GORHAM: May I interrupt just a moment? Well, go ahead. I will ask him later.

Q. Let us begin now with your voyage at Potlatch, the beginning of the voyage, and go down to the point of loss, giving the weather. What was the weather when you left Potlatch?

A. Well, it was what I call fair with very little breeze.

Q. What is that?

A. It is what I would call fair conditions.

Q. And you left there at 6 o'clock in the morning?

A. About.

Q. And how long did it continue fair?

A. Well, there was—when I was abreast of Gamble there was hardly any wind at all; what little there was was from the south or southeast.

Q. Just a moment. All the way then from

(Testimony of Arthur W. Nelson.)

Potlatch to abreast of Gamble you had fair weather?

A. Yes, with light breeze coming down the canal.

Q. All right. Now go on, from Gamble what was your weather?

A. Well—

Q. By the way, what time did you get abreast of Gamble?

A. About 4:30 in the afternoon.

Q. What was your weather after leaving the point off Gamble, West Gamble?

A. Well, I come around Foulweather about a little after five, I could not just exactly say, but a little after five in the evening, about five, and there was a light southeasterly wind, apparently southeasterly along the shore from Foulweather to No Point.

Q. A little southeasterly?

A. Yes, apparently southeasterly; it may have been southerly; I could not say because it will follow the shore; southerly or southeasterly.

Q. From Gamble to—

A. No; from No Point to Foulweather—from Foulweather to No Point.

Q. Now from Gamble from 4:30 to 5 o'clock what kind of weather did you have?

A. It was a little southerly or southeast, just a little breeze.

(Testimony of Arthur W. Nelson.)

Q. And at 5 o'clock where were you?

A. In the neighborhood of around Foulweather Bluff.

Q. Now what was the weather after leaving Foulweather Bluff?

A. I just said a light southeasterly or southerly.

Q. Until what time?

A. No Point; well, it continued as far as I was on shift until 12 o'clock.

Q. It continued that way until 12 o'clock?

A. Yes.

Q. You had a light breeze until 12 o'clock?

A. Well, I call it from 8 to 10 or 12 mile breeze; it is not what we call a—we just call it a light breeze.

Q. Then from Potlatch at 6 o'clock in the morning until midnight you had nothing more than light breezes?

A. Yes.

Q. That is correct?

A. As far as I can remember, yes.

Q. At midnight where were you?

A. About a quarter or a half a mile west of Apple Cove Point.

Q. A quarter to a half a mile?

A. A quarter to a half a mile west of Apple Cove Point.

(Testimony of Arthur W. Nelson.)

Q. West of it?

A. Yes, I would call it west of Apple Cove Point.

THE COURT: East?

Q. You mean east, don't you?

A. West of Apple Cove Point.

THE COURT: You mean Apple Cove Point was west of you?

THE WITNESS: No, I was west of Apple Cove Point.

Q. Will you take a look at the map and get yourself straightened around?

A. This is westerly; this is easterly; westerly is here and I was here.

Q. You were north of Apple Cove Point?

A. We call it westerly—southwest—southwest—

MR. GORHAM: True or magnetic?

THE WITNESS: I was about here.

Q. Make an "A" there—

MR. GORHAM: On Exhibit "4."

Q. —on Exhibit "4," where you were at 12 o'clock.

A. About here.

Q. Make a figure "A" there.

A. About in this position here; there is a dock in here; just abreast of the dock.

(Testimony of Arthur W. Nelson.)

Q. You were about the point where the red round mark is of your letter "A"?

A. Yes.

Q. Northwesterly of Apple Cove Point?

A. Well, I would have to steer to clear Apple Cove Point pretty near east from the position I was.

MR. GORHAM: That is magnetic?

THE WITNESS: Yes.

Q. At that time you turned in?

A. About ten or fifteen minutes after twelve.

Q. When did you awaken?

A. Well, we must have been about a mile and a half—

Q. What time?

A. About I think it was pretty close to 2 o'clock or somewhere around 2 o'clock.

Q. Where were you then?

A. We was about southeast of—about a mile and a quarter or a mile and a half southeast of Jefferson Head, as far as I could judge in the dark.

Q. Do you mean Jefferson Head or President Point?

A. Jefferson Head is the last shore.

Q. Well, I asked you, was it Jefferson Head or President Point?

A. I said Jefferson Head is where we generally pull up to for the last.

(Testimony of Arthur W. Nelson.)

Q. Now at that time what was the weather?

A. It increased to a I would call it a breeze approximately forty, thirty-eight to forty miles an hour, what I would judge over the little experience I have had.

Q. To about how much?

A. A thirty-eight to forty mile breeze.

Q. Thirty-eight to forty?

A. Yes.

Q. Can you compute it as close as two miles?

A. No; just approximately I said.

Q. How long did you stay up there?

A. About an hour.

THE COURT: When was this; what time?

THE WITNESS: In the morning between two and three.

MR. COSGROVE: I asked him, I believe, when he awakened, which was 2 o'clock.

THE WITNESS: About.

Q. About 2 o'clock or ten or fifteen minutes after?

A. Something; I couldn't exactly remember, but it was in the neighborhood of 2 o'clock.

Q. You got up at 2 o'clock and you turned in ten or fifteen minutes after?

A. I was up an hour or so.

(Testimony of Arthur W. Nelson.)

Q. You turned in at midnight ten or fifteen minutes after 12 o'clock?

A. I turned in at midnight.

Q. But at 2 o'clock you staid up until about three?

A. About 3 o'clock.

Q. What was the weather between two and three?

A. Well, as I said, it blowed what you call a local gale or a heavy squall.

Q. Did it continue for the full hour?

A. No.

Q. Well, how much of that hour did it continue?

A. The biggest part of the hour.

Q. What do you mean by that; fifty-one minutes?

A. I could not judge—I didn't watch the time exactly.

Q. I mean thirty-one minutes; that is the biggest part.

A. Well, I could not say exactly.

Q. An hour is sixty minutes. Have you any idea better than the largest part of it?

A. The wind began to recede before I—

Q. Did you have a clock?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. Was it running?

A. Yes.

Q. Were you looking at it?

A. Occasionally, yes.

Q. Were you marking down your time—

A. No.

Q. —and positions?

A. No.

Q. You did not mark that down or anything?

Do they do that on your boat?

A. They do mostly, yes.

Q. That is the general rule, you mark down your positions—

A. Yes.

Q. —as you go from one point to another?

A. Yes.

Q. Do you mark down in your log any unusual circumstance?

A. Any unusual happenings, yes.

Q. Do you mark down unusual weather?

A. Well, if it comes that anything will happen to me, yes.

Q. Well, even if something does not happen to you do you mark down unusual weather?

A. Well, I didn't mark down that.

Q. Well, do you usually?

(Testimony of Arthur W. Nelson.)

A. At times if I see that I am in any danger or anything that is out of the way I do.

Q. Yes, if you think you are in any danger or anything out of the way you mark it down in the log book?

A. Yes.

Q. If you don't think you are in any danger or anything unusual you don't mark it down in the log book?

A. No. It is a habit I should not practice, but I still did it and didn't mark it down.

Q. What is that?

A. It is a practice that I should not continue, but I didn't mark it down at the special time.

Q. Well, other times you mark down unusual weather?

A. When I leave and arrive at certain points.

Q. Well, I asked you, on other occasions when you are handling barges such as this and you meet with any unusual happening you mark it in your log?

A. I never met with anything like this before.

Q. Did you never meet with any weather such as this before?

A. Never that anything happened like this.

Q. I didn't ask you about anything happening.

(Testimony of Arthur W. Nelson.)

I asked you, did you ever meet with any weather like this before?

A. Not so uncertain, no.

Q. What?

A. Not so uncertain, not so unexpected as this.

Q. What do you mean by that, that you got warning in advance, that somebody wrote you a letter that you were going to get a blow?

A. As a rule we watch the barometer and it will tell hours ahead.

Q. Did you have a barometer on this vessel?

A. Yes.

Q. Did you look at it?

A. Yes, we did.

Q. Did you make any readings?

A. No.

Q. You didn't mark it down or anything?

A. No.

Q. Don't you usually mark that down?

A. Well, at times we do.

Q. You did not mark anything down in this log, did you?

A. No.

Q. All you have in this log is your beginning and your ending, isn't it?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. All right. Now we have got up to 3 o'clock. At that time the weather moderated?

A. Yes.

Q. By that what do you mean; what had it come to be at that time?

A. The wind decreased in velocity.

Q. I understand, but to what extent had it decreased; had it come down to the ten or twelve miles again that it was?

A. To twelve to fifteen miles.

Q. And at this time you turned in at 3 o'clock in the morning?

A. Yes.

Q. And the weather was down to twelve or fifteen miles, I believe you testified that at that time the barge was riding well?

A. Yes.

Q. Had the barge ridden well all the way down?

A. Yes, as far as I could observe.

Q. It rode well all the time until you turned in at 3 o'clock?

A. Yes.

Q. Just the way it usually rides?

A. Yes.

Q. During this time did the cargo keep its position on the barge?

(Testimony of Arthur W. Nelson.)

A. I could not see in the dark.

Q. You could not see. As far as you knew it was all right?

A. Evidently.

Q. During this time did the barge sheer from one side to the other?

A. Well, to a certain extent.

Q. That sheering was nothing unusual up until 3 o'clock, was it?

A. It was quiet before; there was no sheer to the scow before the wind began.

Q. I say up until 3 o'clock there was no sheer, was there?

A. Well, during the wind there was a sheer, there was a certain amount of working on the scow.

Q. That was not very much, was it, that sheer?

A. I could not say.

Q. You could not say?

A. No.

Q. Well, between 2 and 3 o'clock did you notice any sheer?

A. To a certain extent.

Q. To a certain extent; how much do you mean by that?

A. Well, I could not say. There was shifting of the lights back and forth in the dark but that is all I could observe.

(Testimony of Arthur W. Nelson.)

Q. Well, was that anything unusual in a breeze of that kind?

A. Yes, it is unusual in a sea.

Q. I asked you, was that unusual in a breeze of that kind?

A. I can't quite understand you.

Q. Well, you had been out with a barge with cars on it before, hadn't you, in a breeze?

A. Yes.

Q. Did the barge sheer any then?

A. Well, at times in sheering off certain swells hit it.

Q. If you got a certain lot of swells at other times you got sheers with your barge?

A. Yes.

Q. You know what a sheer is, don't you?

A. Yes, I quite understand.

Q. Do you recollect having sheers before with this same barge?

A. Not to the extent of this here.

Q. What was the difference in the extent; how could you figure that extent?

A. I could figure on account of the wind and sea and tide working against it, what I could figure.

Q. I think you said the barge was riding normally all the time, didn't you?

A. Until the wind struck us, I said.

(Testimony of Arthur W. Nelson.)

Q. Did you let out your hawser?

A. I had out the full length what I had aboard.

Q. That is all you had; you had no more hawser?

A. About four hundred feet, as usual, that class of boats.

Q. What is the power of this tug?

A. A hundred horsepower, supposed to be.

Q. A hundred horsepower?

A. Yes.

Q. What kind of an engine?

A. Fairbanks Morse.

Q. What type of engine?

A. C. O.

Q. On the way down did you stop any place?

A. No.

Q. Did the engine run continuously—

A. Yes.

Q. —from Potlatch until the time of the loss?

A. Yes.

Q. It kept on the move all the time?

A. Yes.

Q. Now between two and three you travelled from a mile and a quarter to a mile and a half southeast of Jefferson Head to what point; where were you at 3 o'clock?

(Testimony of Arthur W. Nelson.)

A. Oh, about a mile and a half northwest of Meadow Point.

Q. Now I am referring not to the time of the loss. I am referring to the time when you turned in at 3 o'clock, where were you?

A. The position I really could not observe very well because it was pretty near black and I could not observe the conditions very much.

Q. You didn't know where you were then?

A. Oh, yes, I knew where I was, yes.

Q. Where were you?

A. I was between Meadow Point and Jefferson Head.

Q. Well, on what course were you travelling from Jefferson Head?

A. I was heading for Ballard Blinker.

Q. Well, when you got a mile and a quarter to a mile and a half southeast of Jefferson Head you put her on a course for the Ballard Blinker?

A. Yes.

Q. When you turned in then was that the course to be followed by the wheelsman?

A. Yes.

Q. And how far did you intend to go on that course?

A. Under Ballard.

Q. In to Ballard?

(Testimony of Arthur W. Nelson.)

A. Under Ballard shore.

Q. Under Ballard shore?

A. Uh huh.

Q. You turned in at 3 o'clock. Now what next—when did you awaken?

A. About between 3:30 and a quarter of four or ten minutes to four, something like that, between that time, I could not say exactly, I think it was something pretty close to ten minutes to four, 3:50 a. m. I think it was.

Q. You awakened?

A. Yes.

Q. Did you come up then?

A. Yes.

Q. And that is the time you say you saw West Point light and—or where you saw Alki Point Light and the bluffs of West Point in line?

A. Yes.

Q. How was the sea?

A. It was quite a sea running against the tide.

Q. Quite a sea?

A. Yes.

Q. That sea was still running when you got up—

A. Yes.

Q. —at 3:30 or 3:45?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. Was there a sea running at 2 o'clock?

A. It was not much of a sea, but the wind began to blow.

Q. When did the sea come up?

A. Oh, about a half an hour after the wind.

Q. It came up about two-thirty then?

A. About.

Q. You signed a protest, did you, Captain?

A. I think I did.

Q. I hand you Respondent's Exhibit "A-3," and ask you if that is your signature at the top—

A. Yes.

Q. —the first signature on the second page.

A. Yes, sir.

Q. You swore to that before Mr. Gorham?

A. I think I did.

Q. It is dated February 4, 1926. That is correct, is it?

A. I can't remember the date.

Q. Well, take a look.

A. Yes.

Q. Can you see it?

A. Yes.

Q. That is the correct date, is it?

A. I say I could not remember the exact date.

Q. The loss happened on the 3rd of February, 1926?

(Testimony of Arthur W. Nelson.)

A. Yes.

Q. I am going to read you part of this: "That after said tug with said barge in tow had been at sea about twenty-two hours, namely, on the 3rd of February, 1926, at the hour of about 3:50 o'clock a. m., and while said tug with said barge in tow was off Meadow Point about one and one quarter to one and one half miles, the tide then flooding and the sea then being smooth, with a heavy swell running and a strong southerly wind prevailing, said barge under the influence of wind and sea spilled her cargo and said cargo became a total loss." Did you note the part of it there in which you stated that the tide was flooding, the sea was then smooth, a heavy swell running and a strong southerly wind prevailing; did you note that?

A. There is an error in that I believe, because the sea was running, but there was no whitecaps; what I would call a smooth rolling sea; that is the way I would express it; but there was no whitecaps when it was blowing.

Q. Then it was not a smooth sea, was it?

A. The sea can be smooth and rolling. I have been on the high seas.

Q. What is the error then?

A. It sounds I guess the way it is picked up

(Testimony of Arthur W. Nelson.)

that it is a smooth sea and a heavy southerly wind prevailing.

Q. You don't mean to say that Mr. Gorham would make a mistake? That is what you told him?

A. It may be a mistake by the best of men.

Q. Mr. Gorham would not make a mistake. You certainly must have given him that information.

A. It may be misunderstanding.

Q. Did you take any check at any time of the speed that you were making?

A. There is no device to take any check on the speed.

Q. Well, you knew the distances between points, did you not?

A. Yes, about.

Q. And you had a clock?

A. Yes.

Q. You had a chart, didn't you?

A. Yes.

Q. Did you make any computation of the time it took you to run between certain points?

A. I never was accustomed to measure the distances.

Q. You don't know what your speed was then on any given distance?

A. No, I could not say. It is very much variable, the speed.

(Testimony of Arthur W. Nelson.)

Q. How many hours does it usually take you to run between Potlatch and say this point off Meadow Point?

A. With loaded scow the way I had a loaded barge to Seattle, from Potlatch to Seattle, about twenty-three to twenty-four hours.

MR. COSGROVE: Where is that log of the Ketchikan?

MR. GORHAM: Here it is (handing).

Q. Let us take this particular voyage and when did you arrive in Seattle?

A. I rather think it was near 8 o'clock or a few minutes before eight.

Q. A few minutes before eight. Your usual time you say twenty-three or twenty-four hours?

A. Yes.

Q. What time does it usually take you between Potlatch and Seattle with this barge loaded with cars when you meet any weather?

A. Ordinary average time twenty-three to twenty-four hours with loaded barge.

Q. I am talking about not fair weather; I am talking about weather with some wind, some rough weather.

A. We have got to work on the tides a whole lot; if the tide we get the wave the right way with

(Testimony of Arthur W. Nelson.)

Q. How did he put them on; tell me that?

A. I can't get—quite understand you.

Q. Did he have anybody helping him?

A. He had his train crew.

Q. Did you assist in any way?

A. I was there, yes.

Q. Now the barge is a three track barge, isn't it?

A. Sir?

Q. The barge is a three track barge?

A. Yes, sir.

Q. And the cars were loaded onto the barge while she sat on a gridiron, were they not?

A. Yes.

Q. And land tracks ran to each of these tracks on the barge, did they not?

A. Yes.

Q. Did all of the cars come down in one train?

A. That is what I can't tell because I had no charge of that part of the work.

Q. Well, were they not backed on two at a time?

A. Yes.

Q. Which two were put on first, which track?

A. I could not remember.

Q. You don't remember?

A. No, sir.

(Testimony of Arthur W. Nelson.)

Q. There were two on each track, were there not?

A. Yes.

Q. You don't know which cars were put on first?

A. No, I could not remember exactly.

Q. Were the cars backed on with the brakeman on the barge or a member of the train crew on the barge?

A. No, that is something I had no charge of; I had nothing to do with that part.

Q. Well, did you see it?

A. I stood on the barge.

Q. What did you see?

A. I saw the locomotive and the train crew put them on the barge.

Q. Well, you didn't have anything to do with the putting of them on, did you?

A. Not with the working of the locomotive, no, only what I had to do was to tell the conductor where to put them.

Q. What did you tell him now?

A. To load them.

Q. Well, what did you tell him where to put them? You said that was your business. What did you tell him?

(Testimony of Arthur W. Nelson.)

A. Just put them, I said, where they were best fitted to be loaded.

Q. But you left that to him?

A. Yes.

Q. To put the cars on whatever way he saw fit?

A. The best way he could load it to be—the best way to load it.

Q. You left that to him then?

A. Well, that is all I could do. I could not control the locomotive crew.

Q. You did not tell him to put any one car any particular place or anything of that sort?

A. Well, there was only one way to load it.

Q. I say, did you tell him to put any car in any particular place on the barge?

A. There was only one way to load it. It was a heavy locomotive crane, an empty gondola and four loaded cars that we didn't know the actual weight of, just by guess.

Q. You could not tell which were the heavy cars or the lighter cars, could you?

A. No.

Q. You didn't know whether the contents of one would weight ten tons and another twenty tons, did you?

A. About the material there I am not in a position to be a judge of it.

(Testimony of Arthur W. Nelson.)

Q. That was heavy camp construction equipment, wasn't it, the contents of these cars?

A. It was none of my work to—

Q. Couldn't you see what was on the cars?

A. No; it was none of my business.

Q. Couldn't you see?

A. It was none of my business to observe anything that was on the cars.

Q. Oh, well, now let us be honest about this thing. Couldn't you see anything that was on any of those flat cars; did you see anything on those flat cars?

A. It was camp equipment, yes.

Q. All right. Now let us be honest and quit fooling then. What was on those flat cars that was camp equipment; what kind of stuff was it?

A. I didn't pay attention to it.

Q. You didn't see it at all?

A. Yes; it was camp equipment, but what it was I had no real reason to observe.

Q. Was there a donkey boiler on any of them?

A. That is more than I could tell.

Q. Did you see a locomotive crane?

A. Yes.

Q. Did you tell anybody where to put the locomotive crane?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. What did you tell them?

A. To spot the cars even on the head end.

Q. Yes, but did you tell this train crew, this conductor, where to put the locomotive crane?

A. Yes.

Q. What did you tell him?

A. To put it on the middle track.

Q. And he ran these cars then on the tracks and after they were put on did you have any blocking prepared for them so that they ran the cars against the blocking—

A. Yes, sir.

Q. —or did you do the blocking afterwards?

A. I had certain blockings before they were put on.

Q. Oh, you set the blockings before?

A. Certain blockings, yes.

Q. Some of the blocking?

A. Yes.

Q. You did some of the blocking afterwards?

A. Yes.

Q. Now, Captain, let us take the outside track on the starboard side; what timber, if anything, were on that end of the scow or that end of the barge?

A. On the stern end what I would call it where

(Testimony of Arthur W. Nelson.)

the bumper was I had timbers to space the cars to balance it the best condition I could.

Q. Well, you had a head log—

A. Yes.

Q. —across the after end of this barge?

A. Yes.

Q. What size was that?

A. I think it was a twelve by sixteen and then there was an additional twelve by twelve I think it was in front of that.

Q. Well, you don't know whether it was twelve by twelve or twelve by sixteen, that head log, do you?

A. There was one twelve by sixteen bolted, first bolted, and then in front of it was a twelve by twelve.

Q. That twelve by twelve did that run clear across the deck—

A. Yes.

Q. —from starboard to port?

A. Yes.

Q. Was that fastened to anything?

A. It was fastened to the scow—to the barge.

Q. How was that fastened?

A. I can't just remember how that was fastened.

Q. As a matter of fact that was loose, wasn't it?

(Testimony of Arthur W. Nelson.)

THE COURT: That was the twelve by twelve?

MR. COSGROVE: Yes.

Q. Wasn't that twelve by twelve loose?

A. I couldn't say that was loose, but it was there.

Q. Don't you know as a matter of fact that that was loose?

A. I couldn't say as to that.

Q. How long had it been on there?

A. Now that is more than I could really say, the exact time.

Q. Had it been on there any length of time?

A. I believe since I began to handle the barge.

Q. Now the rails ran clear up to these two logs you are talking about?

A. Yes.

Q. And the rails were nailed to the decking, were they?

A. As far as I can remember, yes.

Q. Now how high were the rails, Captain?

A. I think they were four and a half inches high, four and a half or five inches high.

Q. They were fastened to the deck with ordinary railroad spikes, were they?

A. As far as I can remember, yes.

Q. Well, you saw the rails taken off afterwards, didn't you?

(Testimony of Arthur W. Nelson.)

A. No, I didn't see that.

Q. You didn't see that?

A. No.

Q. Going to the outside now, the outside track from the starboard side, you had a head log you say twelve by sixteen inches bolted and you had a twelve by twelve in front of that?

A. Yes.

Q. How close did the car wheels come to the twelve by twelve?

A. There was space to the best of my knowledge to balance the cars, put them as far on the head end of the barge as possible.

Q. That is what I am trying to get at, Captain. How close were the nearest wheels to that twelve by twelve?

A. I can't remember just exactly, but there were some timbers, two or three or more between there, but I couldn't just exactly remember how many, but there was space.

Q. What kind of timbers were there?

A. There was 8 by 8s and 6 by 8s I think it was.

Q. Were they railroad ties?

A. They were square timbers.

Q. Well, were they railroad ties?

(Testimony of Arthur W. Nelson.)

A. That is more than I could tell. They were timbers. They could be used for ties or anything.

Q. Different sizes?

A. There was 8 by 8s and as a matter of fact there was all kinds of timbers on that scow besides these.

Q. But you used 8 by 8s and 6 by 8s?

A. Yes.

Q. And you ran these across the rails?

A. Yes.

Q. You laid them down on the rails?

A. Yes.

Q. And against each other?

A. Yes.

Q. And against the twelve by twelve?

A. Yes.

Q. And against the wheel?

A. Yes.

Q. And you don't know how many there were of those?

A. No, that is what I—It was just to take up space.

Q. There were several of them anyway.

A. Yes.

Q. There might have been a half dozen do you think?

(Testimony of Arthur W. Nelson.)

A. No; there was not many because the space would not allow that much.

Q. You just fitted them in between the twelve by twelve and the wheels?

A. Before the cars were put on the barge.

Q. Oh, before. Did you have any other blocking at that end of the car, I mean on this outside starboard track?

A. There was in the fore and aft under the journals.

Q. On the after end?

A. The after end, wedged in.

Q. You are positive of that, are you?

A. Yes.

Q. Now what did you have on the port track; how were those cars blocked?

A. The same thing.

Q. In the same way?

A. The same.

Q. Now let us take the after end of the middle track, the track where the crane and the gondola car were.

A. Yes.

Q. How did you block those cars on the after end?

A. The locomotive crane was about approxi-

(Testimony of Arthur W. Nelson.)

mately within eight or ten feet—I could not just exactly remember the space—from the bumper.

Q. By the bumper you mean that twelve by twelve timber—

A. Yes.

Q. —that ran across next to the bolted timber?

A. Yes, sir.

Q. Eight or ten feet?

A. Yes, sir.

Q. And what did you have in between the twelve by twelve and the car wheels?

A. There was a timber across in front of the wheels and then a short timber between the two tracks next to the timber close to the locomotive and the same kind of a timber to fill up the space what was between the tie, this twelve by twelve, and the deck and the height of the rails, about four inch, what I would call a pillow, the timbers.

Q. I am afraid I didn't understand you. Now between the tie which was under the wheels and the twelve by twelve you had another tie or timber laid on the deck between the rails?

A. There was one athwartship next to the tie or timber what was against the wheels and then I think it was four inch or four and a half, whatever it was, that filled the space in between the rails, and another one the same height next to this twelve by

(Testimony of Arthur W. Nelson.)

twelve, and then there was fore and aft two timbers against the timber what was against the wheels, wedged in there.

Q. Here is a piece of paper having lines drawn on it. You may consider the two inside lines the inner track, the middle track. Will you take a pencil and draw the head log? We will consider this the barge.

MR. GORHAM: Is that drawn to scale?

MR. COSGROVE: Yes.

MR. GORHAM: 90 by 36?

MR. COSGROVE: Yes.

A. (Witness drawing) That is the timber. This is the wheels here. This is the wedges. These are timbers. This timber here is on top of this here. Here this underneath here to hold this and then wedged in here, and then here is wedges underneath each corner.

Q. Now just a moment. The portion of this diagram which is bounded by the letters A, B, C, D, represents what?

A. This is the bumper twelve by sixteen.

Q. That is what is sometimes called your head log?

A. Yes.

Q. All right. Now I will ask you what the

(Testimony of Arthur W. Nelson.)

part which is bounded by the letters B, F, G, D represent?

A. I could not say how that was fastened.

Q. What does it represent?

A. Twelve by twelve.

Q. A timber twelve by twelve?

A. Twelve by twelve.

Q. And the line H J what does that represent?

A. A timber across the front of the wheels of the locomotive crane.

Q. By that you mean it was under or behind the aftermost wheels of the locomotive crane?

A. Yes.

Q. Now we come to the line K L, what does that represent?

A. Timbers extending from the twelve by twelve up against the timber under the wheels of the locomotive crane.

Q. You say that is timber or timbers?

A. Timbers; two of them, one of them on each side.

Q. I only refer to this particular one?

A. That is one timber.

Q. That is one timber. That lay on the deck, did it?

A. It was about four and a half or five inches off the deck, the height of the rail. It was either

(Testimony of Arthur W. Nelson.)

four or four and a half inches square and to take the space, to give the same height, full face, to support there.

MR. GORHAM: That is what; a cross tie under the wheel?

THE WITNESS: Yes.

Q. What is this line M N?

A. That is what I say, just four by four or four and a half by four, the same height as the rail, pretty close, to give these timbers full support against the timber.

MR. GORHAM: To give which timbers; the fore and aft timbers?

THE WITNESS: The fore and aft timbers full support against these timbers.

Q. What does that lie on?

A. On the deck, this short timber between the rails.

Q. That is between the rails?

A. Between the rails.

Q. And athwart ship?

A. Yes, athwart ship.

Q. Then the timber K L was the timber between the rails near the right hand or starboard rail butting against that twelve by twelve—

A. As close to—

Q. —on one end and resting on M N—

(Testimony of Arthur W. Nelson.)

A. Yes.

Q. —did it rest on M N?

A. It rested on both ends.

Q. It rested on this small one here?

A. Yes.

Q. And against H J?

A. Yes.

Q. Now on the port side there was a similar timber?

A. The same thing.

Q. Did you have a small timber between the rails near the twelve by twelve, as you had up here at M N?

A. The same thing.

Q. O and P represent what; wedges?

A. Wedges.

Q. And K N was eight to ten feet long?

A. I could not say exactly.

Q. I think that was what you said, wasn't it?

A. Something like that, yes. The exact length I could not say.

Q. What size was this M N here?

A. About the height of the rail, four or four and a half inches.

Q. What was the size of K N?

A. Eight by eights.

Q. I assume from the wedging here that the

(Testimony of Arthur W. Nelson.)

crane was run on and all this blocking fitted in after the crane was run on?

A. Yes.

Q. Did you have to cut these pieces K N?

A. Fit them.

Q. You had to cut them after the crane was run on to make it fit?

A. To make it fit.

Q. Now at the other end of these tracks what did you have for blocking?

A. Timber across facing the wheels.

Q. Clear across the rails?

A. Clear across the rails.

MR. GORHAM: You are now referring to the stem of the barge?

MR. COSGROVE: Yes.

A. (Continuing) This is the head end of the barge now. Timber across in front of the wheels with timber fore and aft on each side.

Q. Wait a minute. This timber across the rails was what size?

A. I could not exactly remember; eight by eight or six by eight, something like that.

Q. And you had just one of those under the wheels?

A. Yes.

Q. And then you had a timber—

(Testimony of Arthur W. Nelson.)

A. Fore and aft.

Q. —on each side in addition to that?

A. Yes.

Q. How were they placed?

A. Placed under the journals.

MR. GORHAM: The journals of the car?

THE WITNESS: Yes.

Q. And over this transverse piece?

A. Yes, and wedged up.

Q. Where did you put the wedges?

A. Between the two timbers and if there was any chance I drove—I couldn't remember if it was wedged here under each end, under there, fore and aft, too.

MR. COSGROVE: I offer this in evidence.

MR. GORHAM: No objection.

THE COURT: Admitted.

THE CLERK: Respondent's "A-5".

(Drawing referred to admitted in evidence and marked Respondent's Exhibit "A-5".)

Q. Did you sound this barge before you took her away from Potlatch?

A. She was drained when I left her on the gridiron, drained herself.

Q. She drained herself?

A. Yes.

Q. What do you mean by that?

(Testimony of Arthur W. Nelson.)

A. Through the valves and through the plugs what there is on the barge through the bottom.

Q. Well, she was loaded the afternoon of the 2nd, wasn't she?

A. Yes.

Q. And you sailed the next morning at 6 o'clock?

A. Yes.

Q. Did you sound her the next morning?

A. She was dry; yes.

Q. Did you take her off the night before or that morning?

A. She was at low tide about midnight.

Q. Low tide about midnight?

A. Yes, when I put the plugs in and closed the valves.

Q. That was done at midnight?

A. Yes, about midnight. I don't—

Q. When you pulled her off the next morning you had plenty of water over the gridiron?

A. Yes.

Q. How high was the water then on the barge?

A. Well, I left there early on the tide as soon as she floated. The tide that morning I think—

Q. Did you sound her that morning?

A. I could not remember if I did or not.

(Testimony of Arthur W. Nelson.)

Q. Is it your practice to sound her before going off?

A. It is not the practice because I always drain her before I put the plugs and close the valves.

Q. You have been carrying cars on car barges for some time, have you, Captain?

A. Yes.

Q. Had you at this time, February 3rd, 1926, been towing car barges or Chesley No. 1?

A. Before that, yes.

Q. Had you?

A. Before that time, yes.

Q. Did you set the brakes on these cars?

A. It was not my business of doing that.

Q. I asked you, did you set the brakes?

A. No.

Q. Did any of your crew set the brakes?

A. No, not what I recollect.

Q. What is that?

A. Not what I can remember.

Q. Did anybody else set the brakes?

A. That was the train crew's work.

Q. Did you see anybody else set the brakes?

A. I saw the conductor handle the brakes.

Q. Of course I know you can't see anything that is not your business, but did you see anybody set the brakes?

(Testimony of Arthur W. Nelson.)

A. I saw the conductor handle it.

Q. You saw the conductor himself set the brakes?

A. Yes, because I stood close by.

Q. What brakes did he set?

A. That is—there is only certain brakes on the car.

Q. All right. What brakes did he set on the starboard cars?

A. The hand brakes I suppose it was.

Q. Well, you saw him, didn't you?

A. Yes.

Q. Did he set both of them?

A. Well, there is only one hand brake on each car.

Q. Did he set each brake on the port side?

A. Apparently to me he did, yes.

Q. What is that?

A. Apparently to me what I saw him working he did.

Q. Well, did you stop to watch to see whether he did?

A. No.

Q. You don't remember whether he did or whether he did not, do you?

A. I don't understand.

(Testimony of Arthur W. Nelson.)

Q. Do you remember whether you saw him set the brakes on the port side?

A. The same as he did on the starboard side.

Q. Did you see him?

A. Well, I was on the barge.

Q. Were you watching to see whether he did it?

A. Now I could not exactly remember at this very present time, but to my recollection he did.

Q. At this present time I am talking about now, if you remember.

A. To my recollection he did.

Q. Do you recollect him setting these brakes?

A. Yes.

Q. Did he set the brakes of the middle cars, of the cars on the middle track?

A. There was a hand brake of the locomotive what I believe that I remember of him setting.

Q. You remember him setting that?

A. Yes.

Q. Did he set the hand brake of the gondola?

A. Of the gondola.

Q. Did he set the hand brakes of the locomotive crane?

A. Yes.

Q. You are sure of that now?

(Testimony of Arthur W. Nelson.)

A. I am sure he was working around the brakes.

Q. You are sure he set one on all these cars?

THE COURT: Working around what?

THE WITNESS: Working around the brakes.

Q. You are sure he set hand brakes on all these cars?

A. Well, that is what he was working around.

Q. All right. Did you see him set the hand brake of the locomotive crane too?

A. He was working around the brake.

Q. I asked you, did you see him set it; did you see him turn it and set it?

A. Well, that is the action he did. I could not say.

Q. As Captain of this tug in charge of this barge don't you take any pains when you are towing a barge of cars to see whether or not the brakes of the cars are fastened?

A. Well, it was the train crew done the work.

Q. I asked you, don't you take any pains to see whether they are or are not fastened?

A. My duty is to block them and spot the scow at each end of the journey and handle her while she is in transportation.

Q. Then it is not your duty to see anything about the brakes?

(Testimony of Arthur W. Nelson.)

A. Not particularly.

Q. You don't always pay attention then to see whether or not the train crew did set the brakes or not?

A. Well, I could not say, but I saw the conductor working around the brakes.

Q. What were you doing meanwhile?

A. I stood on the barge close by.

Q. You were doing the blocking, weren't you?

A. No, not while they were loading.

Q. Well, after you got the cars loaded you had to do the blocking for the center cars, didn't you?

A. No.

Q. You said a moment ago that after the crane was put on that you did that blocking on the after part—

A. Oh, yes, after the train crew was through with their work.

Q. The conductor in setting these brakes, do you remember which one he set first?

A. I could not remember exactly.

Q. Did he get up on the cars and walk from one car to the other?

A. No, I could not, because it was all kind of material on them; it was none of my duty to go up on top.

(Testimony of Arthur W. Nelson.)

Q. These cars were the usual railroad flat cars, weren't they, all except the gondola?

A. The gondola. I think the whole works was gondolas.

Q. What is that?

A. I think the whole thing was gondolas.

Q. What do you mean? A gondola has sides on, hasn't it?

A. Yes.

Q. You think they were all gondolas?

A. I think there was some gondolas; I could not say, but as far as I remember, there was some gondolas.

Q. You think there was more than one?

A. I could not exactly remember whether there was or not. I had no business on top of the cars.

Q. Well, the fellow who was fastening these brakes, did he move from one car to the other on top of the cars; did you see him walking back and forth?

A. He walked on the barge from one car to the other as far as I can remember.

Q. Did he walk on the outside or between the cars?

A. Well, he could walk on either side of the cars, either side of the cars for that matter. That is what I could not say.

(Testimony of Arthur W. Nelson.)

Q. When it came to fixing the brakes of the center cars did he walk between those cars and the cars on the outside tracks?

A. I can't just exactly remember.

Q. Did the vessel have any list; did the barge have any list the next morning?

A. About four inches.

THE COURT: Which way?

THE WITNESS: To starboard.

THE COURT: That would be away from the trough if she sheered in the trough?

THE WITNESS: Apparently when we got into the wind it was on the—I would call it on the weather side, because the wind was coming more southerly; we steered about southeast by south I think it was.

Q. How was she fore and aft?

A. About a foot.

Q. A foot—

A. On the head end.

Q. You mean a foot high?

A. Yes.

Q. That means a foot down by the stern?

A. Yes.

Q. How do you recollect that?

A. Well, I had a stick before I left, took a stick and measured from the deck to the water;

(Testimony of Arthur W. Nelson.)

well, by my judgment I judge it was about twenty inches, perhaps twenty-two inches from the water, the low corner.

THE COURT: That is where?

THE WITNESS: On the stern end.

Q. Twenty inches?

A. Twenty to twenty-two inches about from the water.

Q. You mean to the water?

A. Yes; the deck from the water.

Q. Captain, didn't you think it your duty to go and see whether those brakes were set before you left with that barge?

A. It was not particularly my duty. My duty was to block them and look after the navigating part of the boat and handling the barge.

Q. Do you remember on March 30, 1926, at Potlatch, meeting Mr. Hermann, the gentleman that was on the stand a bit ago and myself?

A. I recollect two gentlemen come down to the barge that I had on the gridiron with Mr. Hill-
yer, Superintendent of the Phoenix Logging Com-
pany, but I could not say, I could not remember exactly the day; I could not positively swear to who they were.

Q. You don't recognize me as one of the men who was there?

(Testimony of Arthur W. Nelson.)

A. It may have been or may not because there was so many at times.

MR. COSGROVE: Stand up, Mr. Hermann.

(A gentleman stood.)

Q. Do you recollect seeing this gentleman there at that time?

A. I may and may not. I could not say for sure.

Q. But you remember two men—

A. Two men, yes.

Q. —there on the afternoon of that day with Mr. Hillyer, the representative of the Phoenix Logging Company; you remember two men—

A. Yes.

Q. —on that day talking to you? Did you not tell us at that time that on the middle track there were three pieces of eight by twelve loose laid on the car tracks in front of the head log?

A. No. That is a misunderstanding I believe.

THE COURT: Laid how?

MR. COSGROVE: Laid across the car tracks in front of the head log.

Q. Do you remember telling us at that time that butting against these loose timbers was one eight by twelve laid lengthways of the scow in the middle of the car tracks?

MR. GORHAM: Which car tracks?

(Testimony of Arthur W. Nelson.)

MR. COSGROVE: The middle car track.

A. I can't remember.

Q. Do you recollect telling us that?

A. No.

THE COURT: One eight by twelve laid how?

MR. COSGROVE: In the middle of the track.

THE COURT: The middle of the middle track?

MR. COSGROVE: Yes, butting against these loose timbers aft.

Q. Do you remember telling us that this single timber lying between the rails was butted forward against an eight by twelve laid across the rails under the wheels of the car?

A. I can't recollect exactly what—

Q. You don't recollect that?

THE COURT: Read that question again.

(Question and answer read.)

Q. Don't you recollect showing us that you only had one timber lying fore and aft between the rails aft of the aftermost car on the middle track?

A. I don't think I exhibited any timbers on the very same time.

Q. What is that?

A. I don't think I exhibited any particular timbers.

Q. Didn't you tell us there was only one timber instead of two at that place?

(Testimony of Arthur W. Nelson.)

A. I could not—I don't remember to say—explaining anything there.

Q. You don't remember?

A. No.

Q. Are you sure now that you had two timbers?

A. I had two timbers; I am positive of having two timbers there wedged in.

Q. Then if you told us you only had one you were mistaken?

A. I don't think I explained these things at this time.

Q. Don't you remember pointing out to us just exactly how you fastened these cars on this barge?

A. No. I was not on the stern end of the barge at all, if I remember right.

Q. You don't remember telling us anything about how you fastened the cars on the barge?

A. There was something mentioned, but I don't think I made no special—

Q. Do you remember telling us that across this top piece or across on top of this cross piece—I am referring to the middle track, the after most end—across the piece that was laid under the wheels you laid under the journals of the car other pieces, one end resting under the journals and the other end—

(Testimony of Arthur W. Nelson.)

and the timber sticking up over this piece on the rails, one under each journal of the foremost car; do you remember telling us that?

A. I don't remember explaining all this what you at present mention.

Q. Do you remember telling us that the two loaded cars on each of the outside tracks rested directly against the loose timber next to the head log?

A. No.

Q. You don't recollect that?

A. No.

Q. Would you say that you did not say it?

A. I did not say it.

Q. You did not say it?

A. No.

Q. Do you remember telling us that there were no shores or timbers running from the car wheels or car bodies to the sides of the scow?

MR. GORHAM: What?

MR. COSGROVE: Shores or timbers running from the car wheels or car bodies to the sides of the scow, to the deck of the scow?

A. Any shores, no, I don't remember any shores.

Q. You didn't have any shores—

A. I don't think so.

(Testimony of Arthur W. Nelson.)

Q. —running up from the deck of this barge to the bodies of the cars?

MR. GORHAM: You mean upright shores?

A. No, there was none that I remember.

THE COURT: Vertically?

MR. COSGROVE: Yes.

A. (Continuing) There was none what I remember.

Q. You didn't have any, did you?

A. No, there was none what I remember.

Q. Did you have any wheel clamps?

A. No.

Q. Were the cars chained on in any way, any chains running from any part of the car to any part of the barge?

A. No.

Q. All the blocking that you had was the blocking that you have already testified to here today?

A. The blocking what was usually sent out from Seattle I used the same blocking, the same method.

Q. All right. That is something else new. We will get back to that in a minute. You didn't have any other blocking for these cars than that which you have mentioned today, did you?

A. The usual blocking, yes.

Q. Wait a minute now. Did you have any

(Testimony of Arthur W. Nelson.)

other blocking for these cars than that which you particularly mentioned today?

A. No.

Q. Now we will get back to this blocking that you say that you used that you say was sent out from Seattle. Do you remember telling us that you used whatever blocking they sent out from Seattle for you?

A. We used what we had before on those other cars.

Q. Do you remember telling us that it was not any of your business to go looking for blocking, that you took just whatever they gave you, whatever was sent out from Seattle?

A. Not what I remember. There was always enough on the barge.

Q. Do you remember telling us that, that it was not any of your business to go looking for blocking?

A. No, it was not my business either.

Q. Do you remember telling us that?

A. I may or may not.

Q. And that you used only that which they gave you?

A. There was always plenty on the barge.

Q. Do you remember telling us that a year or a year and a half previous to this Mr. Chesley had used on this same scow wheel clamps?

(Testimony of Arthur W. Nelson.)

MR. GORHAM: Used on the same scow what?

MR. COSGROVE: Wheel clamps.

A. I can't remember if I ever saw wheel clamps on the barge since I came there.

Q. Do you remember telling us that at the time of this loss the weather at that time and just preceding was not unusual, that you didn't know how much wind was blowing, that you could not have estimated it further than to say that there was not much of a wind; do you remember telling us that?

A. No.

Q. Do you remember telling us that an hour before the loss the wind had died down to such an extent that you turned in and you did not know anything of the loss until the man at the wheel called you?

A. No.

Q. Do you remember telling us distinctly that you, Mortensen and Mikelson—Mikelson was your cook, wasn't he?

A. Yes.

Q. —that you, Mortensen and Mikelson did all the blocking?

A. Mikelson had nothing to do with the blocking.

Q. Do you remember telling us that?

(Testimony of Arthur W. Nelson.)

A. No.

Q. Do you remember telling us that just before you turned in the last time that you observed the sea was smooth and the tide was half flood and the wind against you and the tug and tow were making excellent progress in the water?

A. No.

Q. You don't remember that?

A. No.

Q. Would you say you did not say it?

A. I don't remember saying anything like that.

Q. Would you say you did not say it?

A. I don't remember saying it.

MR. COSGROVE: That may not have been your business. That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. When these gentlemen came down aboard your barge or aboard the barge at Potlatch on or about March 30th, did they tell you who they were?

A. I could not remember—I think Mr. Hillyer introduced them, but I could not remember their names.

Q. Did they tell you that one represented the insurance company that had insurance on the cargo and the other was the attorney for the insurance company?

A. I don't think they did, if I remember right.

(Testimony of Arthur W. Nelson.)

RE CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Will you say positively that we did not?

A. Now, I could not remember exactly if you did or not.

Q. As a matter of fact, isn't that the first thing that we told you?

A. Mr. Hillyer was there.

Q. Isn't that the first thing that we told you?

A. I could not remember exactly.

Q. Well, will you deny that we told you that first?

A. No, I wouldn't deny it. I wouldn't say "Yes" or "No."

Q. Let us make this your business now whether we told you that or not. Did we?

MR. GORHAM: I will take Mr. Cosgrove's word if he did. I was simply trying to find out from this witness.

MR. COSGROVE: I say I did.

MR. GORHAM: That is satisfactory.

THE WITNESS: I think Mr. Hillyer introduced me to the men.

MR. GORHAM: I will take Mr. Cosgrove's word whether he did.

THE WITNESS: I think Mr. Hillyer introduced me to the men.

(Testimony of Arthur W. Nelson.)

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Captain Nelson, when your barge is at Potlatch, it must rest on the gridiron before a car can move off or on, mustn't it?

A. Yes.

Q. And to put it on the gridiron you have got to have water to float it in place?

A. Yes.

Q. And sometimes you get there when you want to rest it on the grid before the tide goes out?

A. Oh, the tide has got to be higher on the grid.

Q. And what do you do then; open the valves and flood it?

A. And flood it?

Q. So it will sink down and rest on the grid?

A. Yes.

Q. And then after you have flooded the barge and it is resting on the grid it is then in the position so far as the ends of the rails ashore and the ends of the rails on the barge are concerned to take off and on cars?

A. Yes.

Q. And it is never in position to do that until it does rest on the grid?

A. It has got to rest on the grid.

Q. Now after you have flooded your barge so

(Testimony of Arthur W. Nelson.)

that it may rest on the grid at the particular stage of tide what do you do with that water inside the barge after that?

A. The valves is left open; I flood her and the plugs is usually pulled to flood her and they are left open until it has drained the water out of her.

Q. Now at what stage of tide is it drained?

A. Below the bottom of the barge.

Q. Below the top of the grid, isn't it?

A. Yes.

Q. And at low water is the level of the water below the top of the grid?

A. At times it is two or three feet.

Q. And always low water some inches below?

A. Yes.

Q. So that the water can all run out of the barge that you permit to come into the barge in order to submerge it?

A. Yes.

Q. It all drains out?

A. Yes.

Q. How do you know that the holes through which it is drained are not stopped up with some debris?

A. If they are stopped up I could not get the plugs back in place. From the deck there is long plugs reaching from the top of the deck about a

(Testimony of Arthur W. Nelson.)

foot above the deck and just the size—the hole the size of the plug, a little bit larger, and then the plug is tapered on the bottom and the hole is to fit the taper and you have got to have a clear hole or else go down in the barge to clear the hole to get these plugs fitted in from the top of the deck without any obstacles in it.

Q. The man stands on the deck of the barge to put these plugs in, doesn't he not?

A. Yes.

Q. And the plug runs through the hole in the barge down to the bottom of the barge?

A. Yes.

Q. And is fitted in the hole there?

A. Yes.

Q. From the top deck?

A. Yes.

Q. This estimate you have given of twenty to twenty-two inches, that is what you call the freeboard, isn't it?

A. Yes.

Q. The side of the barge out of water?

A. Yes.

Q. The Ketchikan is known as a semi-diesel engine, a semi-diesel tug boat?

A. Yes.

Q. And requires a crew of three?

(Testimony of Arthur W. Nelson.)

A. Yes.

Q. That is yourself, a second man and a cook?

A. Yes.

Q. And that is within the law, the navigation laws?

A. The law I think will allow two men.

Q. You don't have to have a Master's license to operate one of those, do you?

A. No.

Q. A permit?

A. No.

Q. You have a permit, don't you?

A. I have got a permit. I was never required to.

Q. What is the length of this vessel?

A. Sixty-five feet; sixty-four feet some inches.

Q. What is her beam?

MR. COSGROVE: You are referring to the tug?

MR. GORHAM: The tug, yes.

A. The beam I think is twelve feet some inches.

MR. GORHAM: That is all, if the Court please.

RE CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Did you tell us whose business it was to replace the plugs?

A. Most of the time I done it myself.

(Testimony of Arthur W. Nelson.)

Q. Do you recollect who replaced the plugs on this barge on this particular night?

A. It was most my own work to take care of that.

Q. You don't answer my question at all. I asked you if you recollect who did it?

A. I think, if I ain't mistaken, we were both of us out that night, two, Mr. Mortensen and I.

Q. You are not sure?

A. I am pretty near positive we were both of us; oftentimes we were out.

Q. What is the freeboard of the tug?

A. Well, it depends on how much fuel she has got in her. If she is full laden with fuel she lays about a foot of freeboard from the guard.

Q. What was her freeboard at the beginning of this voyage?

A. Well, I think there was about twelve or fourteen hundred gallons of fuel in her at the time.

Q. I didn't ask you how many gallons of fuel. I asked you how much freeboard?

A. About a foot.

Q. About a foot?

A. I would judge about a foot.

Q. At the beginning of this voyage?

A. Yes, at the midships.

MR. GORHAM: Freeboard where; what part of the vessel?

(Testimony of Arthur W. Nelson.)

MR. COSGROVE: The lowest.

Q. Where would the lowest be?

A. It would be twenty-four to twenty-six feet from the stern.

Q. That freeboard would not change much on this voyage, would it?

A. Not much, no.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. If those plugs had not been put in at low water she would not float the next high water, would she?

A. No.

Q. She would fill again, wouldn't she?

A. Yes.

Q. And she did float—

A. Yes.

Q. —when you started on your voyage?

A. Yes.

Q. And that fact is evidence that the plugs were all set in their proper places, isn't it?

A. Yes.

MR. GORHAM: That is all.

THE COURT: Were there any marks on the barge to show how this load went off?

THE WITNESS: After, yes, I observed there

(Testimony of Arthur W. Nelson.)

was from the wheels after it had left the rails there was cut in a kind of an angle towards the after starboard corner, two on the—I think it was two on the—

THE COURT: Two marks on the twelve by sixteen to show that it went over the stern?

THE WITNESS: I didn't see it.

MR. COSGROVE: That obliges me to ask him another question.

RE-CROSS EXAMINATION.

BY MR. COSGROVE:

Q. The next morning was the twelve by sixteen there?

A. No.

Q. When you got to Seattle was the twelve by sixteen there?

A. There was only a little part of the twelve by sixteen, just a little corner.

Q. Where was that?

A. Hanging on to one of the bolts.

Q. Hanging on to one of the bolts?

A. Yes.

Q. Which way were the bolts bent?

A. Part of them—well now I could not say exactly, but most of them were bent aft and to starboard.

Q. And some of these wheel tracks that you say you saw went directly aft, didn't they?

(Testimony of Arthur W. Nelson.)

A. Well, I don't remember exactly. I think they all showed a little angle toward the starboard corner.

Q. Didn't some of them go directly aft?

A. No, I couldn't say. What I saw of it the next morning, what I remember, it showed creases leaning toward the starboard corner, the starboard after corner.

MR. COSGROVE: All right.

(Witness excused.)

MR. GORHAM: May we have three or four minutes?

THE COURT: We will interrupt the trial with ex parte matters.

(A brief intermission.)

THE COURT: Mr. Gorham and Mr. Cosgrove, how many more witnesses will you have?

MR. GORHAM: I have one more witness in my case in chief, who is not here, and I am going to ask the indulgence of the Court and counsel to put him on later.

(Discussion.)

THE COURT: The Court will be at recess 10 minutes.

(Recess.)

MR. GORHAM: If the Court please, we have to get one witness, Mr. Thompson, who is a witness

on valuations of locomotive cranes. He was here yesterday. I asked him to come back this morning. I have not seen him today, and I ask the indulgence of the Court that I may call him out of order if he comes in sometime during the morning.

THE COURT: Any objection?

MR. COSGROVE: No.

MR. GORHAM: Otherwise we rest.

MR. COSGROVE: A stipulation has been filed in this matter and has been referred to heretofore, a stipulation for the consolidation of these two cases and the amendment of Respondent's article three of the separate and affirmative defenses. Interrogatories were attached to the answer in the Chesley case, answers have been returned, and in the Guthrie case, answers have been returned, and in the Guthrie case the stipulation includes this paragraph which I will ask to read into the record: (Reading)

“That the interrogatories and answers to interrogatories propounded and returned in said Cause No. 5539”—which is the Chesley case—“shall be considered interrogatories and answers to interrogatories in this cause with the same force and effect as if propounded and returned herein.”

You stipulate that I may read that into the record?

MR. GORHAM: Yes.

MR. COSGROVE: At this time I would like to read the interrogatories and the answers. Mr. Gorham, if it is agreeable, I will read the questions and you read the answers. Will you do that?

MR. GORHAM: Yes, if you want, or you may read them all.

MR. COSGROVE: Introducing the questions and answers into evidence.

(The proctors read interrogatories and answers thereto, and proceedings were had thereon, as follows):

“INTERROGATORIES PROPOUNDED TO LIBELLANT TO BE ANSWERED BY ONE OF ITS OFFICERS UNDER OATH:
Interrogatory No. 1:

“When was the barge Chesley No. 1 built, give her construction, tonnage (gross and net), and dimensions.”

Answer to Interrogatory No. 1:

“Built in 1913.

Construction—Wooden barge with 5 solid bulkheads and 5 trusses.

Tonnage—193 gross and net.

Dimensions—90'x36'x7'.

Custom House Measurement—90'x36'x7' 8" over all.”

Interrogatory No. 2(a):

Please list all of the voyages of said barge

between November 1, 1925, and February 2, 1926, giving the ports of sailing and destination, dates of sailing and with what cargo loaded.”

MR. GORHAM: That is a subdivision, isn't that, of that?

Interrogatory 2, subdivision (a).

MR. COSGROVE: Subdivision (a). I am willing, Mr. Gorham, that we may read that later and go on with the others.

THE COURT: Read it in argument, do you mean?

MR. COSGROVE: Beg pardon?

THE COURT: You propose to read it in argument?

MR. COSGROVE: No. I propose to read this one later on in the trial. It is a long listing and for the time being we can skip it.

MR. GORHAM: If you want to. It is your case.

(Continuing reading.)

Interrogatory No. 2(b):

“Please give the name of the tug towing said barge on each of said voyages, give also the name of the then owner and master of each of said tugs.”

Answer to Interrogatory No. 2(b):

“Names of tugs, their owners and masters, towing on said voyages, are as follows:

Tug Ketchikan II.

Owners: Libellant.

Master: Nelson.

Address, care Libellant.

Tug Tempest.

Owners: Libellant.

Master: McDevitt, now deceased.

Tug Lillico, No. 20.

Owner: Lillico Tug & Barge Co.

Master: Bert Thomas.

Address: Unknown."

Interrogatory No. 2(c):

"What weather did said barge encounter on each of said voyages?"

Answer to Interrogatory No. 2(c):

"Unknown to Libellant."

Interrogatory No. 2(d):

"Did barge take water on any of these voyages? If so, what voyages, and how much water and under what circumstances?"

Answer to Interrogatory No. 2(d):

"Not to Libellant's knowledge."

Interrogatory No. 2(e):

"Did barge have to be pumped out during the period of November 1, 1925, to February 2, 1926? If so, when?"

Answer to Interrogatory No. 2(e):

"Not to Libellant's knowledge."

Interrogatory No. 2(f) :

“Did said barge have to be pumped out on any of said voyages? If so, upon what voyage, and when, and by what means was said pumping accomplished? How long did each of said pumping operations take?”

Answer to Interrogatory No. 2(f) :

“Not to Libellant’s knowledge.”

Interrogatory No. 2(g) :

“Please produce at the trial of this action the original log books covering said voyages of each of the tugs towing said barge upon said voyages, attach hereto the copies of all entries in said log books relating to said voyages giving the names and addresses of persons making such entries.”

Answer to Interrogatory No. 2(g) :

“Log book of KETCHIKAN II from January 16, 1926, to February 2, 1926, and log book of tug TEMPEST from November 9, 1925 to February 2, 1926, now at office of proctor for Libellant subject to inspection by Respondent and its proctor.

Present whereabouts of log book of tug KETCHIKAN II from November 1, 1925 to January 15, 1926, unknown to Libellant.

Names and addresses of persons making entries in said log books unknown to Libellant

except as follows: Names and addresses of Masters of KETCHIKAN II and TEMPEST given in Answer to Interrogatory No. 2(b)."

Interrogatory No. 3:

"When was barge last caulked prior to February 2, 1926, what was the extent and character thereof, and by whom and where done?"

Answer to Interrogatory No. 3:

"October, 1923, by Maritime Boat & Engine Works, Seattle, Washington.

Extent and character, see Answer to Interrogatory No. 4."

Interrogatory No. 4:

"When and where was said barge last on drydock prior to February 2, 1926? For what purpose was she on such drydock, and what was thereon done to said barge?"

Answer to Interrogatory No. 4:

"October, 1923. Hauled, scraped, cleaned, scrubbed, and copper painted bottom; took out nine planks in bottom and replaced, caulked and cemented seams; put on four planks and guards for chafing strake head end; took out piece of head log and replaced with new; took off rails and put on sheathing and replaced rails; took off rake guards and replaced; made new plug, took off, straightened and replaced corner irons;

made new combing around hatches forward end; hawsed in and filled seams, and caulked where found necessary.”

Interrogatory No. 5:

“What collisions, strandings or accidents befell said barge during or upon any of said voyages, or during said period of time, give detailed statement of effect thereof upon her hull, timbers and caulking?”

Answer to Interrogatory No. 5:

“No collisions, strandings or accidents.”

Interrogatory No. 6:

“What was done by way of hull repairs to said barge during said period, when and by whom?”

Answer to Interrogatory No. 6:

“No hull repairs other than as shown in Answer to Interrogatory No. 4, except incidental repairs from time to time as occasion required.”

Interrogatory No. 7(a):

“Of what did the cargo of the barge consist on the voyage beginning February 2, 1926, at Potlatch, Washington, if it consisted of railway cars how many were there, what sizes and weights, and with what were they loaded; what was the approximate total weight of said cars and other cargo?”

Answer to Interrogatory No. 7(a):

“Locomotive crane on its own wheels,
weight 63 tons
5 railway cars, weight each..... 20 tons
1 car, empty
1 car, containing goods, weight, exclusive
of car 42 tons
1 car, containing goods, weight exclusive
of car 19 tons
1 car, containing goods, weight exclusive
of car 8 tons
1 car, containing goods, weight exclusive
of car 38 tons”

Interrogatory No. 7(b):

“How and where were said cars placed on said barge? The term ‘cars’ used in this interrogatory includes said crane and idler.”

Answer to Interrogatory No. 7(b):

“Crane and idler (empty railway car) placed on center track.

Two railway cars on each outside track.”

Interrogatory No. 7(c):

“How were they fastened or secured to said barge in order to prevent their rolling or shifting?”

Answer to Interrogatory No. 7(c):

“Across the after end was a 4x16 timber with a 12x12 timber on top bolted to the barge with several 1” bolts and four 1½” anchor bolts

with 6' washers on them, in front of that another 12x12 timber, and in front of that, between that 12x12 timber and the wheels of the cars, would be usual railroad ties which were about 7x9 or 8x8 timber to fill in the space between the 12x12 timbers and the wheels of the car. On the other end of the scow we used timbers or a railroad tie across the track and another 8x8 timber or railroad tie under the journals of the car wedged in place with ship wedges, on each side."

MR. COSGROVE: There is a further answer to this particular interrogatory.

MR. GORHAM: Yes; we ask to have the further answer served and filed. The further answer of Libellant to the interrogatory is as follows:

(Reading)

"That said railway cars and said crane and idler car were further fastened or secured to said barge as follows:

Said locomotive crane on its own wheels coupled to said idler car was placed on the center track of said car barge and against said 7x9 or 8x8 timbers, said idler car being forward of the crane; and the brakes of all said railway cars and said idler car, as spotted on said car barge, were set by air and by hand."

MR. GORHAM: The inference of that is and

we intend it shall be our statement as far as we know that the brakes were not set on the locomotive crane itself; it only refers to the four cars on the two outside tracks and the idler.

MR. COSGROVE: The understanding as I had it from Mr. Gorham was that the effect of that was an agreement that the locomotive crane was not braked.

MR. GORHAM: As far as we knew at the time and as far as I know now. Mr. Foote, the conductor, who braked them all, is here and he will speak for the fact. I have not asked him about it.

MR. COSGROVE: I take it that the answer to the interrogatory is that it was not fastened—not braked.

MR. GORHAM: As far as we know. We are only answering to our own knowledge. If the fact is different I presume the Court wants the fact. So far as we know now that is the true answer, if the Court please.

(Continuing reading.)

Interrogatory No. 7(d):

“Were said cars secured with shores?”

Answer to Interrogatory No. 7(d):

“No.”

Interrogatory No. 7(e):

“Were said cars secured with jacks?”

Answer to Interrogatory No. 7(e):

“No.”

Interrogatory No. 7(f):

“Were said cars secured with rail clamps?”

Answer to Interrogatory No. 7(f):

“No.”

Interrogatory No. 7(g):

“If your answer is that said cars were secured with shores, jacks and or rail clamps, please describe the same, and state how many there were and where placed.”

Answer to Interrogatory No. 7(g):

“See above.”

Interrogatory No. 8(a):

“Please produce at the time of trial the original log book of the tug Ketchikan II, showing all voyages made by the said Ketchikan II during the period of November 1, 1925, to and including February 4, 1926, and attach hereto copies of all entries in said log books relating to any and all of said voyages.

Answer to Interrogatory No. 8(a):

“See answer to Interrogatory No. 2(g).”

MR. GORHAM: Those log books so far as we had them were in my possession subject to the inspection of the Respondent and its proctors in my office and they were submitted to him before trial.

(Continuing reading.)

Interrogatory No. 8(b):

“Upon said voyage beginning February 2, 1926, was said barge manned? If so, how, and by whom; did it have any pumping equipment of its own?”

Answer to Interrogatory No. 8(b):

“Barge not manned. No pumping equipment of its own.”

MR. COSGROVE: We offer those questions and answers in evidence.

THE COURT: Admitted.

MR. GORHAM: Including the list of voyages that I did not read.

MR. COSGROVE: Yes, we consider them—

MR. GORHAM: Read.

MR. COSGROVE: —read in evidence.

MR. GORHAM: As attached to my answers on file.

MR. COSGROVE: Yes. That is Interrogatory No. 2, subdivision (a). I give that to the stenographer.

MR. GORHAM: Yes, that is right.

(Interrogatory No. 2(a) and the answer thereto are here copied into the record as follows:)

Interrogatory No. 2(a):

“Please list all of the voyages of said barge between November 1, 1925, and February 2, 1926, giving the ports of sailing and destination, dates of sailing and with what cargo loaded.”

Answer to Interrogatory No. 2(a):

“Voyages of Chesley No. 1 between November 1, 1925, and February 2, 1926, ports of departure and destination, dates of sailing and cargoes, are as follows:

SCOW CHESLEY NO. 1—Nov. 1st, 1925, to Feb. 3rd, 1926.

1925	Date	No.	Depart.	Arrival	Cargo	From	To	Tug
		2598	11-4-9 A.M.	11-5-6 A.M.	4 cars	Seattle	Potlatch	Tempest
			11-6 A.M.	11	3 cars	Potlatch	Seattle	Tempest
		2610	11-8-1 P.M.	11-9-3 P.M.	4 cars	Seattle	Potlatch	Ketchikan
			11-10-11 A.M.	11-10-10:20 P.	4 cars	Potlatch	Seattle	{ Ketchikan V. Grubb }
		2616	11-12-11:30 P.	11-13	2 cars	Seattle	Mud Bay	Tempest
			11-15-7 P.M.	11-16-7 A.M.	1 car	Mud Bay	Seattle	Tempest
		2625	11-17-Noon	11-18	2 cars	Seattle	Potlatch	Tempest
			11-19-4 A.M.	11-20-2 A.M.	2 cars	Potlatch	Seattle	Tempest
		2643	11-26-1 A.M.	11-26-11 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
			11-27 P.M.	11-28 P.M.	4 cars	Poulsbo	Seattle	Ketchikan
		2653	11-29-1 A.M.	11-29-6 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
			12-3	12-4-11:30 A.	4 cars	Poulsbo	Seattle	Tempest
		2664	12-6-6 A.M.	12-7-7 A.M.	1 Loco.	Seattle	Dry Creek	Tempest
					3 cars	Dry Creek	Potlatch	Tempest
		2674	12-9-10 A.M.	12-9-11 P.M.	4 cars	Potlatch	Seattle	Tempest
			12-11-1 A.M.	12-12-Noon	3 cars	Seattle	Dry Creek	Tempest
			12-13-3 A.M.	12-13-P.M.	0 cars	Dry Creek	Seattle	Tempest
		2677	12-15-3 A.M.	12-16-5 P.M.	6 cars	Seattle	Dry Creek	Tempest
			12-17-5 A.M.	12-17-9 P.M.	3 cars	Dry Creek	Seattle	Tempest

2687	12-19 P.M.	12-20-7 P.M.	5 cars	Seattle	Potlatch	Tempest
	12-23 P.M.	12	4 cars	Potlatch	Seattle	Tempest
2708	12-28-2 P.M.	12-29-6 A.M.	3 cars	Seattle	Dry Creek	Tempest
	12-30-5 A.M.	12-30-6 P.M.	3 cars	Dry Creek	Seattle	Tempest
2709	12-31-11 A.M.	1-1 A.M.	3 cars	Seattle	Dry Creek	Tempest
1926						
No.						
25	1-1 P.M.	1-2 P.M.	3 cars	Dry Creek	Seattle	Tempest
	1-3-1 P.M.	1-4-2:30 P.M.	6 cars	Seattle	Mud Bay	Tempest
	1-6-11 A.M.	1-7-12:20 P.M.	Empty	Mud Bay	Seattle	Ketchikan
31	1-29-2 A.M.	1-29-7 A.M.	4 cars	Seattle	Port Orchard	Ketchikan
	1-29-4 A.M.	1-29-7 P.M.	0 cars	Port Orchard	Seattle	Ketchikan
32	1-7-11 P.M.	1-9-1 A.M.	5 cars	Seattle	Potlatch	Lilloo No. 2
	1-9-10 A.M.	1-10-2 A.M.	0 cars	Potlatch	Seattle	Lilloo No. 2
33	1-14-4 A.M.	1-15-6 A.M.	4 cars	Potlatch	Seattle	Ketchikan
34	1-17-6 A.M.	1-18 A.M.	6 cars	{ Seattle Potlatch }	{ Potlatch Dry Creek }	Ketchikan Ketchikan
35	1-20-9 A.M.	1-22-1 A.M.	4 cars	Dry Creek	Seattle	Ketchikan
	1-25-2 A.M.	1-26	6 cars	Seattle	Potlatch	Ketchikan
	1-27-11 A.M.	1-28-4 A.M.	4 cars	Potlatch	Seattle	Ketchikan
44	1-31-8 A.M.	2-1 A.M.	6 cars	Seattle	Potlatch	Ketchikan
	2-2-5:30 A.M.	2-3-8 A.M.	5 cars 1 Loco. Crane	Potlatch	{ Lost off Meadow Point }	Ketchikan

WILLIAM J. MOLONEY, called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. COSGROVE:

Q. Captain, what is your business?

A. Surveyor to the Board of Marine Underwriters.

Q. At what point?

A. Seattle.

Q. That is what Board; who is the Board of Marine Underwriters that you speak of?

A. Well, the Board of Marine Underwriters consist of a number of insurance companies who have banded together to form a company where they can have men that have knowledge of ships and repairs to ships and different equipment on ships, to be in a position to advise them as to risks and losses and general marine work.

Q. Is that Board local?

A. No; it is in—San Francisco is the headquarters. They have representatives in each port on this side.

Q. On the Pacific Coast?

A. On the Pacific Coast.

Q. You are the representative at Seattle?

A. Yes.

Q. What seafaring experience have you had?

(Testimony of William J. Moloney.)

A. About a little over thirty years.

Q. What has been its character?

A. Well, I have been Master of everything from a tub boat to a transport.

Q. Where?

A. All over the world.

Q. Do you hold an American license?

A. I hold an unlimited Master's license for steam and sail vessels.

Q. All oceans?

A. All oceans.

Q. How long have you been engaged in the surveying business?

A. I have been permanently employed by the Board of Marine Underwriters for eight years. I had a temporary appointment previous to that covering about seven years before that; altogether about fifteen years.

Q. Have you had any navigating experience on Puget Sound waters?

A. Yes; I hold a pilot's license on Puget Sound waters and tributaries.

Q. Have you ever had any experience in those waters actually navigating vessels?

A. Oh, yes; I have sailed sailing vessels on Puget Sound from Seattle to sea, from Hoods Canal to sea, Port Gamble and Port Townsend to sea; I

(Testimony of William J. Moloney.)

have run a tug boat in practically all ports of Puget Sound.

Q. Hauling barges?

A. Yes, I have towed barges.

Q. Have you made any computations of distances from Potlatch on Hoods Canal this way?

A. Yes.

Q. What is the mileage from Potlatch to Appletree Point?

MR. GORHAM: Apple Cove Point.

Q. (Continuing) Apple Cove Point, a quarter mile off?

A. I think it is fifty-three miles.

Q. What is the distance between Foulweather Point and Apple Cove Point?

A. I will have to refer to my notes on that; I don't remember just the exact distance. I have got some notes on it.

Q. You heard the testimony here as to the approximate point of this loss?

A. Yes.

Q. What is the distance from Potlatch to that point?

A. Fifty-nine and a quarter miles.

Q. What is the distance between Apple Cove Point and the point of loss?

A. I think it is six and a quarter miles.

(Testimony of William J. Moloney.)

MR. GORHAM: How much?

THE WITNESS: Six and a quarter.

Q. What is the distance between Apple Cove Point and President Point, if you remember?

A. I think it is three and a quarter. Those distances we could measure them all. I am not quite sure. They may be a little bit out one way or the other.

(Chart shown to Mr. Gorham by Mr. Cosgrove and conference between respective proctors.)

Q. I have here a chart; will you state what it is?

A. This is a chart of Puget Sound, Seattle, No. 6460; it is Seattle to Olympia is the sub-heading under it.

MR. COSGROVE: We offer that in evidence.

MR. GORHAM: No objection.

THE COURT: Admitted.

THE CLERK: Respondent's No. "A-6."

(Chart referred to admitted in evidence, marked Respondent's Exhibit "A-6", and placed on easel.)

MR. COSGROVE: It is just a continuation.

Q. You heard the testimony of one of these witnesses this morning relative to Blake Island?

A. Yes, part of it; not all of it.

Q. Does Blake Island show on this last exhibit?

A. Yes, Blake Island shows on that.

(Testimony of William J. Moloney.)

Q. Will you point it out so the Court may see where it is?

A. Blake Island shows on the upper portion of this Seattle to Olympia chart at this point here (indicating).

Q. Captain, what computation, if any, did you make of the time it took the Ketchikan to run from Potlatch to Apple Cove Point beginning at Potlatch at 6 o'clock and arriving off Apple Cove Point at 1:30?

A. At 1:30?

Q. Yes, at what rate of speed?

A. It figures out about 2.72 miles per hour.

MR. GORHAM: 2.72?

THE WITNESS: Yes, 2.72 miles per hour.

Q. And assuming the loss to have taken place at 3:30, what was the rate of speed between Apple Cove Point and the point of loss?

A. She made almost three miles an hour from Appletree Cove to the point of loss.

Q. Do you know the Ketchikan II?

A. Just in a general way; I have seen her and been aboard of her.

Q. You have heard the testimony as to what kind of a vessel she is?

A. Yes.

Q. What power she has—

(Testimony of William J. Moloney.)

A. Yes.

Q. —the kind of engines she has, her length and so forth? You have heard the testimony as to the size of this barge—

A. Yes.

Q. 90 feet by 36 feet by 7 feet 8 inches, and you have heard the testimony as to what she was loaded with?

A. Yes.

Q. You heard the manner of her loading?

A. Yes, in a general way I have knowledge of the way she was loaded.

Q. You heard Mr. Mortensen testify as to how it was loaded?

A. Yes.

Q. And you heard how Captain Nelson testified as to her loading?

A. Yes.

Q. And you heard the interrogatories as to the manner of loading?

A. Yes.

Q. I will ask you, Captain, if in your opinion the locomotive crane should have been braked?

A. Yes.

Q. In your opinion was the—

MR. GORHAM: Don't lead the witness. He

(Testimony of William J. Moloney.)

is an intelligent man. Ask him what was necessary to be done.

Q. You heard the testimony, Captain, as to the boom on the crane, how the boom was stowed?

A. I did.

Q. And the testimony as to the turn-buckles?

A. Yes.

Q. What in your opinion would be the effect, naturally expected effect, of such stowage of said crane, having in mind the boom being placed above the gondola sixteen inches and fastened with turn-buckles, as the testimony shows?

A. There would be a tendency there for that turn-buckle to slack up and the crane, that is the boom part of the crane, to bang from one side of the gondola to the other, causing a general loosening up of the whole equipment on the middle track, and then eventually the gondola and the crane itself would have a tendency to slide to the lower end of the barge.

MR. GORHAM: How is that?

THE WITNESS: The gondola car and the crane, the locomotive crane, with the loosening up of the blocking on the track it would cause the gondola car to slide down towards the lower end, towards the head log.

MR. GORHAM: We move to strike that. That

(Testimony of William J. Moloney.)

is not responsive to his question. There is no hypothetical question about the blocking getting adrift.

THE COURT: Motion denied.

Q. You heard the testimony as to the blocking, the testimony of Captain Nelson as to the blocking of the crane and the gondola car?

A. Yes.

Q. In your opinion was that proper or improper blocking?

A. It was improper blocking.

Q. What are your reasons for so stating?

A. The first reason I should give would be in regard to the gondola car, it being, as I understand, of a weight of sixty-eight tons, there should have been special effort made to secure that gondola car individually irrespective of—the locomotive crane rather, irrespective of the gondola car.

THE COURT: Then you don't mean gondola? You mean crane?

THE WITNESS: I mean the locomotive crane, yes, sir. Special attention should have been paid to securing the locomotive crane, it being so much heavier equipment than the rest of the barge load.

Q. What do you mean by special attention; what particular things should be included in the way of special attention?

A. Well, that crane being on the middle track,

(Testimony of William J. Molon
and it is much shorter—it was
feet long and the car would app
feet long—forty feet long, th
sixty-eight feet—would allow a
ninety foot barge; it would leav
more, and those two pieces of eq
had more attention in blocking
relatively heavier than the sid
have been.

Q. What kind of blocking
used?

A. Well, I should have b
the ties would have been suffici
had been spiked to the deck
there would have been no chan
loose with the vibration. Then
motive crane, should have bee
deck upward, shored up so as to
of the springs of the locomotive

Standard Marine Insurance Co., Ltd.

(Testimony of William J. Moloney.)

as to take a slight portion of the weight crane off the springs of the car and that would prevent any side motion or side working of the tendency to loosen up the other fastenings.

Q. Suppose I hand you respondent's "A-1"; it may be that you can show to me what you mean through the use of the drawing.

A. From that point there, Your Honor, underneath the sill of the car to the deck of the barge there should have been some shores fitted up to take the weight off of it and then that would prevent vibration of these springs in the car and make it solid.

Q. In your opinion was the fastening of the boom proper or improper?

A. The boom should have been lowered down and made fast to the gondola car after two shores had been placed on the barge. Previously on the barge the boom was attached to the deck.

(Testimony of William J. Moloney.)

of gravity being two and a half feet forward of the center of the deck of the locomotive crane, what effect, if any, would have been a distribution of weight on the wheels of the locomotive?

A. Well, it would be very small; it would make very little difference. The main danger would be not the loss of the center of gravity, but the danger of the swinging of the boom and by that way loosening up the blocking.

Q. What in your opinion was the blocking aft of the locomotive crane; I refer to the timbers aft of the locomotive crane; was that proper blocking?

MR. GORHAM: I don't think that counsel ought to put such categorical questions to this witness.

THE COURT: That calls for a "Yes" or "No" answer. I sustain the objection.

MR. GORHAM: The witness is an intelligent man. He knows his business I think.

THE COURT: Of course it is a preliminary question. It can be followed up and if he says it is improper he can point out and say in what respect it is improper.

MR. COSGROVE: That is exactly what I intended to do.

THE COURT: I sustain the objection. You can ask him, if he states it is improper, to state in

(Testimony of William J. Moloney.)

what respects, then we can get it all in one question. We don't need just a "Yes" or "No" answer.

Q. Referring to the blocking after the wheels, Captain,—I mean the wheels of the locomotive crane—will you state whether or not in your opinion that was proper or improper blocking and state why in giving the answer which you do give.

A. The blocking as stated by Captain Nelson previously was six by nine or six by eight or eight by eight. In my opinion that was too small for the locomotive crane. There should at least have been four or five blocks of ten by twelve in there and those fastened so that they would be one unit and could not work out.

Q. Any other reasons?

THE COURT: What dimensions did you mention?

A. About ten by twelve, Your Honor, and they should be fastened securely so that there would be no chance of them working out, and then also that car should have been wedged up from the deck and shores fitted then underneath of the couplings to prevent the car moving forward. There is not so much danger on this particular barge of the car moving forward because it had a down hill tendency towards the lower end of the barge, there was not so much danger of it running up hill, as we might

(Testimony of William J. Moloney.)

say, but there would be a danger of it running down hill if the blocking on the lower end had got loose.

Q. Would it be possible for the forward end of the barge to become lower at any time than the after end?

A. No, not with relation to the way those weights were put on the car unless the barge had suffered a collision or become water logged and then the forward end might get lower than the after end.

Q. In your opinion, Captain, was the blocking of the cars on the outer tracks proper or improper, and please state your reasons for your answer?

A. It was improper because the blocking was not fastened and whenever I go down to pass on any of these barges loaded with cars I always insist that that blocking between the wheels and the head log or the bumper log as some people call it shall be spiked, made fast, so that it is one unit. In that way I mean if there is five or six or seven pieces of wood in between the wheels of the car and the bumper log I insist that that would be all spiked together with battens and spiked to something substantial connected with the barge. In that way when it is in a sea-way there is no chance of that blocking between the wheels and the bumper log working loose, but if they are put in there just dropped in there there is always a tendency with a little vibration and rolling for them to work out.

(Testimony of William J. Moloney.)

Q. Was the method or lack of method of blocking the bodies of these cars proper or insufficient and give your reasons?

A. Well, it was insufficient because the blocking, as I have heard here, was not fastened.

MR. GORHAM: Because what?

THE WITNESS: Because the blocking was not fastened.

Q. I refer to the bodies of the cars.

A. And then the bodies of the cars were not shored. All railroad equipment when it is transported by water it is a requirement of our office that the car bodies shall be shored up from the deck. The reason of doing that is to prevent a side sway of the cars. The cars all swing on their springs, sway on their springs. They get out in a sea-way, they will naturally sway on their springs the same as they will going over a hilly road, and any equipment that is not held up solid against this side-sway it is bound to work loose, so the way we get away from that is we fit shores from underneath the sill of the car to the deck of the barge; then those shores are set up strong with wedges so that a certain amount of the weight of the car is lifted off of the springs. In some of the larger car barges they have jacks for this special purpose that are just screwed up underneath the sill of the car.

(Testimony of William J. Moloney.)

Q. In your opinion, what was the sufficiency or insufficiency or propriety or impropriety of blocking forward of these cars and state your reasons for your answers.

A. I would like to distinguish between the blocking forward and the blocking aft. As a matter of fact, you mean the low end or the high end?

Q. I refer to the forward end, the end opposite the so called head log.

A. Well, the blocking on that end, as I understand from the testimony, consisted of shores underneath the trunnions of the car that were held in place by a railroad tie jammed underneath them and wedged up. Well, in my opinion there should have been chains fitted to hold those cars from any forward movement.

Q. Where would the chains be fastened?

A. Well, there is posts on the barge. They could be fastened around the posts on the barge. They could be fastened to the after tow-bits. There is numerous places on the barge where these chains could have been fastened to, or in fact on any barge.

Q. You heard Captain Brownfield's testimony as to sheer?

A. Yes.

Q. Assuming, Captain, the movement of this tug and tow from Apple Cove Point to the point of

(Testimony of William J. Moloney.)

loss at the rate you named a while ago, which I think was something like three miles per hour—

A. Yes, approximately three miles per hour; 2.70—a little better than two and three quarters.

Q. —what would you have to say as to the probability of this barge sheering?

A. I don't think that barge done any sheering to amount to anything, because she made very good time considering the power of the boat that was towing her. I might further state that a vessel that sheers around takes longer to tow a certain distance than one that follows straight.

Q. What would be the comparison as to the probability of sheer of this barge unloaded as against this barge loaded as she was?

A. Well, a barge light has got a greater tendency to sheer than a loaded barge. The wind will catch a light barge and she will start off on an angle, and the progress of the vessel when she gets out at say an angle of around thirty-five to forty degrees then she has got a tendency more to slow down the towing vessel until such a time as that sheer is overcome, then the barge will immediately start over in the opposite direction and run a little bit that way and she will gradually slow down her sheering something like the pendulum of a clock until she is following in the wake of the towing vessel again, then

(Testimony of William J. Moloney.)

she may run along straight for a matter of ten minutes or fifteen minutes or two hours and then all at once she will start off again and make another sheer and that sheer works out gradually until it comes to nothing and it follows the vessel again, and in that way the vessel's sheering will slow down the towing vessel considerably.

MR. COSGROVE: Will you draw a line, Captain, on these exhibits, on these charts which have been put in evidence, between Alki Point and West Point bluffs; just draw a line projected on past the bluffs? Here is a red pencil; you can mark it with that.

(Witness marking.)

Q. What do you know about the winds and the seas in the early part of February, the usual and expected winds and seas in the early part of February on Puget Sound between Hoods Canal and Seattle; what are they?

A. Well, you might say that in February there is variable winds. February is considered a variable month. The winds will fluctuate from southerly around to northwest.

Q. Well, go on and further describe.

A. You may get a lot of wind up around Seattle here and then away down at Port Townsend you may have no wind at all; variable winds; they

(Testimony of William J. Moloney.)

are localized a great deal by the surrounding land; where there is high land: the wind may be a little bit stronger in the channel, and where there are low lands it does not affect them so much.

Q. What is the normally to be expected spread of velocities of wind during the month of February?

A. Well, I would say the winds run from calms up to around thirty-five or forty miles an hour.

Q. What sort of seas in this particular area of Puget Sound may be normally expected during this month?

A. Well, it is very hard to say the sea. The sea will always be controlled more or less by the wind. A forty mile wind, southerly wind, will make a considerable sea in the lower regions of Puget Sound and a ten mile wind won't make any sea at all.

MR. COSGROVE: Let us have that protest.

Q. Suppose, for instance, we had this kind of weather at this particular point: one and one-quarter to one and one-half miles of Meadow Point, the tide then flooding, the sea then being smooth, with a heavy swell running and a strong southerly wind prevailing?

A. You could not have anything like that.

Q. Why?

A. Because it is an impossibility. You have

(Testimony of William J. Moloney.)

got to have one thing or the other. You have a smooth sea and no wind, but you can't have a smooth sea and a heavy swell and a strong breeze. The things are utterly at variance; you can't reconcile them any way.

Q. Would you compare, Captain, the weather which Mortensen testified to receiving between 1:30 and 3:30 on the 3rd of February with weather which might be expected in the month of February?

MR. GORHAM: Did you hear Mortensen's testimony?

THE WITNESS: Yes, sir.

MR. GORHAM: All right.

A. Yes, I think that weather was just about normal February weather; there was nothing unusual in it.

Q. Did you hear Nelson's testimony this afternoon?

A. Yes.

Q. Will you compare the weather recited by him for the same period with what might normally be expected in the month of February?

A. Why, I could not see any reason for changing my previous answer that the weather was just the normal February weather. There was nothing unusual, nothing more than to be expected anywhere on Puget Sound in that month.

(Testimony of William J. Moloney.)

Q. You heard the testimony of one of the witnesses this morning bringing a couple of barges of sand and gravel from about Olympia towards Seattle and one of them getting adrift and going aground on the south shore of Blake Island?

A. Yes.

Q. And that later he was able to get his barge off and he took the two of them in to Seattle?

A. Yes.

Q. Having in mind his testimony now what kind of weather in your opinion actually existed at that time?

MR. GORHAM: Where?

MR. COSGROVE: At the south end of Blake Island at the point where he took off his barge.

A. I would say if the Captain of the Prosper took his loaded barge in on the south shore of Blake Island to pick up another loaded barge which was ashore on there I would say the weather was unusually calm and smooth.

THE COURT: We will interrupt the trial at this time and it will be resumed tomorrow morning at 10 o'clock. You may adjourn court until tomorrow morning at 10 o'clock.

Further proceedings continued to 10 o'clock A. M., December 29, 1927.

(Testimony of William J. Moloney.)

December 29, 1927, 9:30 A. M.

Hearing resumed. Same parties present.

WILLIAM J. MOLONEY, a witness for respondent, recalled to the stand, testified as follows:

DIRECT EXAMINATION (Resumed).

BY MR. COSGROVE:

Q. Read the last question. (Question read.)

Q., By the Prosper you meant the Tempest, did you not?

A. The Tempest, yes.

Q. Did you make any calculation of distance between the south shore of Blake Island and the Canal locks?

A. Yes, sir.

Q. What is that distance?

A. Ten miles.

Q. And if the master of the Tempest left the south shore of Blake Island at three o'clock and arrived at the locks at six o'clock, did you arrive at the rate he was going?

A. That would make about three miles an hour, three hours; a little bit better than three miles an hour.

Q. Assuming that the weather at Bush Point, a southerly wind was blowing 35 or 40 miles an hour, at flood tide, one or two hours flood, in February, does it follow that the same or similar

(Testimony of William J. Moloney.)

weather was to be found at other points on the Sound—say at the point of this loss rather? Give your reasons for your answer.

A. In my experience I have found conditions on Puget Sound where there would be a fresh breeze of 24 or 30 miles an hour some places and practically a flat calm at others. That was my experience when I was sailing schooners.

Q. You didn't quite answer my question. Read the question. (Question read.)

A. No.

Q. Give your reasons.

A. The wind and sea are greatly controlled by the land adjacent. Some places where the land is higher you may find that certain winds will be stronger. Other winds—winds from other directions in that same location—it may be a flat calm underneath that point, and practically across the Sound be quite a wind blowing. Winds on the Sound are controlled largely by the adjacent lands.

Q. Suppose you had a five-minute breeze, at 36 miles, what kind of a wind or breeze would that be? What would that mean to a navigator?

A. Just call it a squall, wind squall.

Q. For what areas do such five-minute wind squalls cover the water?

MR. GORHAM: If he knows.

(Testimony of William J. Moloney.)

MR. COSGROVE: If he does not know he can say so.

A. How is that?

Q. What areas do those five-minute wind squalls cover in Puget Sound, if you know?

A. It might only cover the exact place. It might cover one place right here and another place two or three miles away. It might not be continuous.

Q. Now let us forget for a moment all the testimony of the cross examination of Mortensen and the captain on the captain on the blocking, submitted in the answers to interrogatories; assuming that this barge was loaded at Potlatch the 2nd day of February, in the afternoon, with a locomotive crane weighing 63 tons and a gondola car weighing 20 or 25 tons, a 25 ton gondola on the center track, the crane aft, five cars each weighing approximately 20 tons, one car containing some 42 tons, another one 19 tons, another 8 tons, another 38 tons, two of those cars being on each of the outside tracks, all of the cars being blocked by a hand block, the crane not being blocked at all, and the blocking being as follows: across the after end was a 4 by 16 timber with a 12 by 12 timber on top, bolted to the barge with several 1-inch bolts and four 1½-inch anchor bolts with 6-inch washers, on them in front of that another 12 by 12 timber, and in front of that timber, that 12